

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

DOCKETED TERM, 1902

No. 122

CHICAGO AND NORTHWESTERN RAILWAY COMPANY
PLAINTIFF IN ERROR

WILLIAM F. GRAY

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS

RECORDED AND INDEXED

(12.12)

(23,813)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 232.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

WILLIAM H. GRAY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

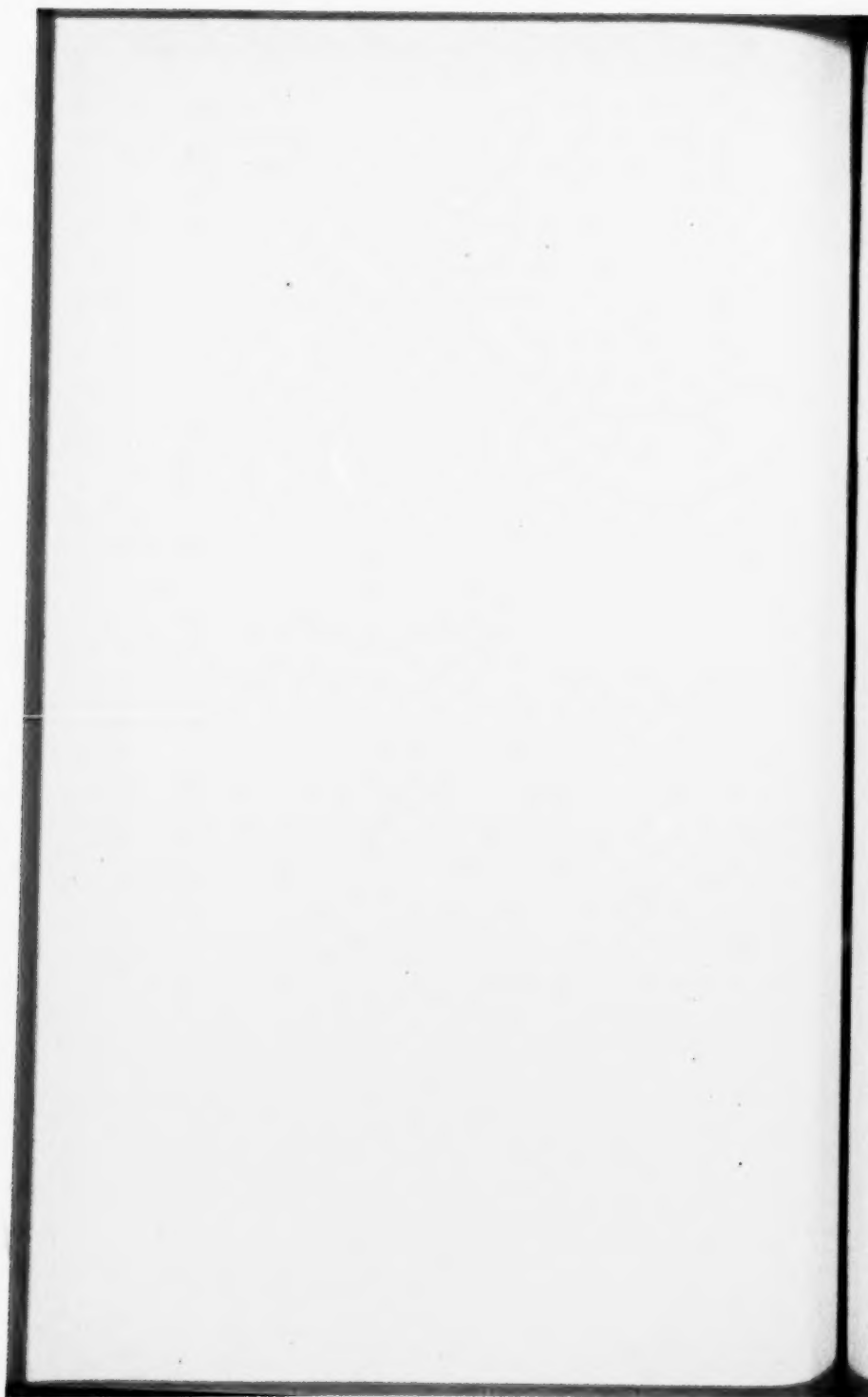
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Original.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Wisconsin before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in said suit between Chicago and North Western Railway Company, plaintiff in error, defendant below, and William H. Gray, defendant in error, plaintiff below, wherein was drawn in question the construction and application of a statute of the Congress of the United States, and wherein was denied to the plaintiff in error the right, privilege and immunity specially set up and claimed by the plaintiff in error under a statute of the Congress of the United States, and the decision was in all respects adverse to the plaintiff in error; a manifest error hath happened to the great damage of the Chicago and Northwestern Railway Company, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the
2 record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, in the said Supreme Court, on the 30th day of July, 1913, to be then and there held that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, the 30th day of June, 1913.

[Seal District Court, Western District of Wisconsin, Madison.]

F. W. OAKLEY,

*Clerk of the District Court of the
Western District of Wisconsin.*

By FRED W. FRENCH, *Deputy.*

STATE OF WISCONSIN,
Supreme Court, ss:

The return to the within writ appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

[Endorsed:] Original. State of Wisconsin, Supreme Court. Chicago and North Western Railway Company, Plaintiff in Error, Defendant Below, vs. William H. Gray, Defendant in Error, Plaintiff Below. Writ of Error. Edward M. Smart, Attorney for Plaintiff in Error. Filed Jun- 30, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

Original.

STATE OF WISCONSIN,
In Supreme Court:

January Term, 1913.

No. 122.

WILLIAM H. GRAY, Plaintiff,
vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

Assignment of Errors and Prayer.

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled case, the defendant hereby prays a writ of error, from the said decision and judgment to, the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

And the said Chicago and North Western Railway Company assigns the following errors in the records and proceedings of the said case:

The Supreme Court of Wisconsin erred in construing an Act of Congress of the United States, to-wit, the Act of April 22, 1908, 35 Statutes 65, Chapter 149, and the amendment thereof under date of April 5, 1910, 36 Statutes, 291, Chapter 143, commonly known as the Federal Employers' Liability Act, and in denying to said defendant, Chicago and North Western Railway Company, the plaintiff in error herein, the right, privilege and immunity specially set up and claimed by plaintiff in error under the said Act
6 afor-said.

The said errors are more particularly set forth as follows:

The Supreme Court of Wisconsin erred in holding and deciding—

First. That the employment of an engine dispatcher in taking care of engines immediately after their return from interstate trips does not constitute "employment in commerce between the several states" under the Act of Congress aforesaid.

Second. That an engine dispatcher whose duties require him to dispatch alternately engines engaged in intrastate and interstate commerce, if injured while waiting for engines to be turned over to him to be dispatched, is not then "employed in commerce between the several states" within the meaning of the said Act of Congress aforesaid, and such an employe is not injured "while he is employed in commerce between the several states" within the meaning of said Act aforesaid.

Third. That in order to constitute "employment in commerce between the several states" an engine dispatcher must be employed exclusively in dispatching engines in interstate commerce.

Fourth. That the employment in which the plaintiff William H. Gray was engaged at the time of his injury, did not constitute "employment in commerce between the several states" within the meaning of the Act of Congress aforesaid.

7 Fifth. That the plaintiff, William H. Gray, was not injured "while employed in commerce between the several states" within the meaning of the Act of Congress aforesaid.

Sixth. That the plaintiff, William H. Gray, was not, as a matter of law, guilty of contributory negligence.

Seventh. That the damages should not be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff, William H. Gray.

For which errors the defendant, Chicago and North Western Railway Company, plaintiff in error herein, prays that said judgment of the Supreme Court of the State of Wisconsin, dated May 31, 1913, be reversed and a judgment rendered in favor of the defendant company and for costs.

EDWARD M. SMART,

Attorney for Chicago and North Western Railway Company.

STATE OF WISCONSIN,

Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the Chicago and North Western Railway Company to William H. Gray, in the Sum of Ten thousand dollars; such bond when approved to act as a supersedeas.

Dated June 30th, 1913.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,

Chief Justice Supreme Court of Wisconsin.

8 [Endorsed:] Original. State of Wisconsin, Supreme Court.
William H. Gray, Plaintiff, vs. Chicago and North Western

Railway Company. Petition. Assignment or Errors. Prayer. Edward M. Smart, Attorney for petitioner. Filed Jun- 30, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

9

Original.

*Citation.*THE UNITED STATES OF AMERICA, *as:*

The President of the United States to William H. Gray, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Wisconsin, wherein the Chicago and North Western Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Wisconsin, this 30 day of June, 1913.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,

Chief Justice, Supreme Court of Wisconsin.

Attest:

CLARENCE KELLOGG,

Clerk Supreme Court of Wisconsin.

MILWAUKEE, Wis., July 1st, 1913.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge service of the above citation.

STEPHEN J. McMAHON,

Attorney for William H. Gray.

10

[Endorsed:] Original. State of Wisconsin, Supreme Court. Chicago and North Western Railway Company, Plaintiff in Error, Defendant Below, vs. William H. Gray, Defendant in Error, Plaintiff Below. Citation. Edward M. Smart, Attorney for Plaintiff in Error. Filed Jul- 2, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

11

Copy.

Bond.

Know all men by these presents, that we, Chicago and North Western Railway Company, as principal, and Fred Vogel, Jr., and Wm. Bigelow, of Milwaukee, Milwaukee County, Wisconsin, as

sureties, are held and firmly bound unto William H. Gray in the penal sum of ten thousand dollars (\$10,000), good and lawful money of the United States of America, to be paid to said William H. Gray, his certain attorney, heirs, executors, administrators, successors and assigns pointly and severally, firmly by these presents.

Sealed with our seals and dated this 25th day of June, 1913.

Whereas, lately at a term of the Supreme Court of the State of Wisconsin, and on the 31st day of May, 1913, in a suit depending in said Supreme Court, between William H. Gray, plaintiff, and the Chicago and Northwestern Railway Company, defendant, a judgment was rendered against the said Chicago and North Western Railway Company, and it intends to obtain a writ of error and file a copy thereof in the office of the clerk of said court, to review and reverse the judgment in the aforesaid suit, and a citation directed to the said William H. Gray, citing and admonishing him to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date thereof;

Now, the condition of the above obligation is such, that
12 if the said Chicago and North Western Railway Company shall prosecute said writ of error to effect, and if it fail to make its plea good, shall answer all damages and costs, including just damages for delay, and costs and interest on the appeal, then the above obligation is void, otherwise to remain in full force and effect.

[SEAL.]

CHICAGO AND NORTH WESTERN
RAILWAY COMPANY,

By H. R. McCULLOUGH, *Vice-President.*

FRED VOGEL, JR.

[SEAL.]

WM. BIGELOW.

[SEAL.]

Countersigned:

CHAS. L. LOWE,

Ass't Sec'y.

13 STATE OF WISCONSIN,
Milwaukee County, ss:

Fred Vogel, Jr., being duly sworn says he is one of the subscribers to the foregoing bond; that he is a resident and freeholder within the State of Wisconsin; and is worth the sum of five thousand dollars (\$5,000) over and above all his debts and liabilities, in property within the State of Wisconsin, not by law exempt from execution.

FRED VOGEL, JR.

Subscribed and sworn to before me this 26th day of June, 1913.

[SEAL.]

JAMES E. MOORE,

Notary Public, Wisconsin.

My commission expires Jan'y 28, 1917.

STATE OF WISCONSIN,
Milwaukee County, ss:

Wm. Bigelow being duly sworn says that he is one of the subscribers to the foregoing bond; that he is a resident and freeholder within the State of Wisconsin, and is worth the sum of five thousand dollars (\$5,000) over and above all his debts and liabilities, in property within the State of Wisconsin, not by law exempt from execution.

WM. BIGELOW.

Subscribed and sworn to before me this 26th day of June, 1913.

[SEAL.]

JAMES E. MOORE,
Notary Public, Wisconsin.

My commission expires Jan'y 28, 1917.

Bond approved and to operate as a supersedeas.

Dated June 30th, 1913.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice, Supreme Court of Wisconsin.

14 [Endorsed:] Copy. State of Wisconsin, Supreme Court. Chicago and North Western Railway Company, Plaintiff in Error, Defendant Below, vs. William H. Gray, Defendant in Error, Plaintiff Below. Bond. Edward M. Smart, Attorney for Plaintiff in Error. Filed Jun-30, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

15 Original.

Certificate of Lodgment.

SUPREME COURT,
State of Wisconsin, ss:

I, Clarence Kellogg, Clerk of said court, do hereby certify, that there was lodged with me as such clerk on June 30th, 1913, in the matter of William H. Gray against Chicago and North Western Railway Company:

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error as herein set forth, one for the defendant, William H. Gray, and one to file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Madison, Wisconsin, this 30th day of June, 1913.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk Supreme Court, Wisconsin.

16 [Endorsed:] Original. State of Wisconsin, Supreme Court. Chicago and North Western Railway Company, Plaintiff in Error, Defendant Below, vs. William H. Gray, Defendant in Error, Plaintiff Below. Certificate of Lodgment. Filed Jun- 30, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

17 (Copy.)

In Supreme Court of the State of Wisconsin.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

To the Clerk of the above-entitled Court:

You will please prepare transcript of the record in this cause to be filed in the office of the Clerk of the United States Supreme Court, under proceedings in error heretofore perfected herein, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Summons and Complaint.
2. Answer.
3. Judgment.
4. Bill of Exceptions, excepting and excluding therefrom all exhibits.
5. Notice of Appeal, undertaking and clerk's return on appeal.
6. Opinion and decision of the Supreme Court of Wisconsin.
7. Record entries of the judgment of the Supreme Court of Wisconsin.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the State of Wisconsin

EDWARD M. SMART,
*Chicago and Northwestern Railway
Company, Plaintiff in Error Herein.*

Service of a copy of the above præcipe is admitted this 1st day of July, 1913.

STEPHEN J. McMAHON,
Attorney for Defendant in Error.

18 [Endorsed:] Copy. State of Wisconsin, Supreme Court. William H. Gray, Plaintiff, vs. Chicago Northwestern Railway Company, Defendant. Præcipe. Filed Jul- 2, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

In the Supreme Court of the State of Wisconsin.

WILLIAM H. GRAY, Plaintiff,
vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

To the Clerk of the above entitled Court.

It is desired that you please incorporate in the transcript of the record in this cause to be filed in the office of the Clerk of the United States Supreme Court, in the proceedings in error heretofore perfected herein, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. All exhibits, including plaintiff's exhibits A, B, and C inclusive, and defendant's exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9, inclusive.
2. Certificate of the Clerk of the Municipal Court of Outagamie County, Wisconsin, for the transmission of said above enumerated exhibits attached thereto.

Said pleadings, proceedings and papers to be incorporated and included in the transcript to be prepared as required by law and the rules of the Supreme Court of the State of Wisconsin and the Supreme Court of the United States.

STEPHEN J. McMAHON,
Attorney for Plaintiff William H. Gray,
Defendant in Error Herein.

Service of a copy of the above præcipe is admitted this 10th day of July, 1913.

EDWARD M. SMART,
Attorney for Plaintiff in Error.

20 [Endorsed:] Copy. State of Wisconsin Supreme Court.
William H. Gray, Plaintiff, vs. Chicago & North Western
Railway Company, Defendant. Præcipe. Stephen J. McMahon,
Attorney for William H. Gray. Filed Jul- 11, 1913. Clarence
Kellogg, Clerk of Supreme Court, Wis.

21 Pleas Before the Supreme Court of the State of Wisconsin at
a Term Thereof, Begun and Held at the Capitol in Madi-
son, the Seat of Government of said State, on the First Tuesday.
To wit: the Seventh Day of January, A. D. 1913.

Present: Hon. John B. Winslow, Chief Justice; Hon. Roujet D.
Marshall, Hon. Robert G. Seibecker, Hon. James C. Kerwin, Hon.
William H. Timlin, Hon. John Barnes and Hon. Aad John Vinje,
Justices; Clarence Kellogg, Clerk.

Be it remembered that heretofore, towit; on the sixth day of
December in the year of Our Lord One Thousand Nine Hundred
and Twelve came into the office of the Clerk of the Supreme Court

of the State of Wisconsin, the Chicago & Northwestern Railway Company, by its attorney, and filed in said Court its certain Notice of Appeal and Undertaking, according to the statute in such case made and provided, and also the return to such appeal, of the Clerk of the Municipal Court of Outagamie County, in said State, in words and figures following, that is to say:—

22 STATE OF WISCONSIN:

Municipal Court, Outagamie County.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

To Mr. Stephen J. McMahon, Attorney for Plaintiff, and Mr. A. O. Danielson, Clerk of the Aforesaid Court:

Please take notice that the above named defendant, Chicago & Northwestern Railway Company, hereby appeals to the Supreme Court of the State of Wisconsin from a judgment rendered by the above named court in the above entitled action entered on the 4th day of December, 1912, in favor of the plaintiff, William H. Gray, and against the defendant, Chicago & Northwestern Railway Company, for the sum of Seven Thousand Nine Hundred thirty two and 51/100 Dollars (\$7,932.51) damages and costs, and from the whole thereof.

EDWARD M. SMART,
Attorney for Defendant.

Dated December 4, 1912.

23 STATE OF WISCONSIN:

Municipal Court, Outagamie County.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Whereas on the 4th day of December 1912, in the Municipal Court for Outagamie County, the above named plaintiff recovered judgment against the above named defendant for the sum of Seven thousand nine hundred thirty-two and 51/100 dollars (\$7,932.51) damages and costs; and the defendant, Chicago & Northwestern Railway Company, feeling aggrieved thereby intends to appeal therefrom to the Supreme Court of the State of Wisconsin.

Now, therefore, the National Surety Company of the City of New York and State of New York does hereby undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal, not exceeding two hundred and fifty dollars (\$250.00);

And does also undertake that if such judgment, so appealed from, or any part thereof, be affirmed, the said appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part; and all damages which shall be awarded against said appellant on the said appeal.

NATIONAL SURETY COMPANY,

By WM. F. LYNCH, [SEAL.]

Attorney in Fact.

Dated December 4th, 1912.

24

State of Wisconsin.

Department of Insurance.

This is to certify, that the National Surety Company of New York, New York, has complied with all the provisions of law, and is authorized to transact the business of (7) fidelity or surety-ship insurance in this State from the first day of March, 1912, until the twenty-eighth day of February, 1913, inclusive, unless its authority be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin, this 4th day of March, 1912.

[SEAL.]

HERMAN L. EKERN,

Commissioner of Insurance.

No. 8.

I, Herman L. Ekern, Commissioner of Insurance of the State of Wisconsin, hereby certify that I have compared the foregoing copy with the original certificate of authority, issued to the National Surety Company of New York, N. Y., *Company* and now on file and of record in my office and in my lawful custody, and that such copy is a true copy of said original and of the whole thereof.

Witness my hand and official seal at Madison, Wisconsin, this 31st day of August, A. D. 1912.

[SEAL.]

HERMAN L. EKERN,

B.,

Commissioner of Insurance.

25

(Endorsements:) Original. Municipal Court Outagamie County. William H. Gray, Plaintiff, vs. Chicago & Northwestern Railway Company, Defendant. Notice of Appeal and Undertaking. Due service of a copy of the within notice and undertaking admitted this 4th day of December, 1912. Stephen J. McMahon, Attorney for Plaintiff. A. O. Danielson, Clerk of Municipal Court. Filed Dec. 5 1912. State of Wisconsin. In Municipal Court for Outagamie County. A. O. Danielson, Clerk. Edward M. Smart, Milwaukee, Wis., Attorney for C. & N. W. Ry. Co.

26 STATE OF WISCONSIN:

Municipal Court, Circuit Court Branch, Outagamie County.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, a Corporation,
Defendant.

Summons.

The State of Wisconsin to the said Defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

STEPHEN J. McMAHON,

Plaintiff's Attorney.

P. H. MARTIN, *of Counsel.*

P. O. Address 504 Goldsmith Bldg., Milwaukee, Milwaukee County, Wis.

27 STATE OF WISCONSIN:

Municipal Court, Circuit Court Branch, Outagamie County.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, a Corporation,
Defendant.

Complaint.

The above named plaintiff by Stephen J. McMahon, his attorney, and P. H. Martin, of counsel, complains of the above named defendant, and for cause of action alleges as follows:

1. That the defendant is and was at the various times hereinafter stated, a railroad corporation, duly organized and existing under and by virtue of the laws of the state of Wisconsin, and owning and operating a commercial railroad between the city of Antigo in Langlade County, and various cities, villages and other places in said state, carrying passengers and freight for hire.

2. That said defendant owns and maintains in and about said city of Antigo, where are located the headquarters of the Ashland Division of defendant's railroad line, yards, extending north and south about three miles, more or less, in length and extending east and west about one-fourth of a mile, more or less, in width at its widest part. That in these yards are situated freight and passen-

ger depots, office buildings, railway tracks, locomotive engines and other rolling stock, a cinder pit, a coal shed, a blow-off box for containing steam and water discharged from engines, a cabin or shanty for the use and convenience of plaintiff and other employees during leisure moments and lunching hours, a large stationery water tank, a large pile of fire wood, a round house or barn for housing engines and other buildings, materials, facilities and equipment usually used in connection with a railroad. That in said city partly between the south line of First Avenue extended, and the north line of Third Avenue extended, both of said avenues running east and west, there is running north and south on the westerly side of said yards, a surface side track, which is also known as an ingoing track, extending from the main track of defendant's railway line to a point north of said round-house, which latter is situated north of said First Avenue. On said side track approximately and about over the north and south lines of Second Avenue extended, which likewise runs east and west, there is said cinder pit, which is open and under ground, about eighty-one feet in length, more or less, about thirteen feet in width, more or less, and about two and one-half feet in depth, more or less, over and along which said side track extends. Said cinder pit is used principally for receiving hot ashes and burning coals dumped into it in emptying and cleaning the fire places of defendant's said locomotive engines. About six feet, more or less, north of said cinder pit, on the west side of said side track and parallel thereto, is said coal shed, which is of considerable height and width, and about two hundred and seventy-three feet in length, more or less. Between the west rail of said side track and the east line of said coal shed is a space of about three feet and nine inches, more or less, in width upon and along which runs a beaten foot path or track, over which plaintiff was required to travel and pass frequently, in the discharge and performance of his duty as an employee of

28 said defendant, as hereinafter more particularly stated. On the east side of said sidetrack, several feet therefrom and parallel thereto, is situated said blow-off box, which extends in an easterly and westerly direction, and is several feet in height and width. About twenty-one feet, more or less, north of said blow-off box, and about thirteen feet, more or less, east of said sidetrack and parallel thereto, is said cabin or shanty of the width and height of an ordinary box car. North of said cabin or shanty, on the east side of said side track and parallel thereto, are situated said sand house, a sand tower, said stationery water tank and said wood pile, at short distances apart and located consecutively.

29 3. That the plaintiff is an inhabitant, resident and citizen of the city of Kaukauna, in the county of Outagamie, in said state.

4. That the plaintiff on and prior to the 19th day of January, A. D. 1911, was an employee of said defendant in the capacity of engine dispatcher, in and about the said yards of defendant in said city of Antigo. That plaintiff's principal and usual duties as such dispatcher were (a) to receive defendant's said engines, of various sizes, with tenders attached thereto, from the engine crews in charge

thereof, when brought into said yards, in the ordinary course of business upon their return from trips between various other places and said city of Antigo; (b) to cause the fire and ashes to be emptied from the fire place of such engine into said cinder pit situated in said yards for such purpose, and assist in said emptying; (c) to cause the amount of water and steam in the boiler of each engine to be reduced by discharging the same into said blow-off box, situated in said yards for such purpose, and assist in the same;

(d) to cause the tender of each engine to be loaded with 30 coal from said coal shed, situated in said yards for such purpose, and assist in such loading; (e) to cause the tender attached to each engine to be filled with water from said stationery tank, situated in said yards for such purpose, and assist in said filling; (f) to cause the tender of each engine to be supplied with kindling wood from said wood pile, situated in said yards for such purpose, and assist in supplying the same; and (g) to run each engine so received and dealt with into said round-house, so situated in said yards for housing the same. That, in addition to said principal duties, it was the duty of said plaintiff, (h) to occasionally drive said engines and other engines in switching cars loaded with freight, wood, cinders and other materials, and cars in bad order, in and about said yards; (i) to guard, care for and protect the said property of defendant, and particularly said cinder pit and its immediate surroundings; (j) to prevent the damage or destruction of said property by fire or other causes; and (k) to promote and further the interests and welfare of said defendant in and about said yards, generally.

5. That it was the duty of said defendant to provide said plaintiff with reasonably safe, suitable, sufficient and proper places and facilities in which and with which to perform his said duties, and for said defendant by and through its other employees, servants, agents and officers, in the discharge and performance of their duties, to use due, proper and ordinary care, skill, diligence and prudence in preventing and avoiding injury or damage to the person and property of said plaintiff while in the discharge of his duties; and that said duties of said defendant and its other employees, servants, agents and officers to said plaintiff were wholly disregarded and violated by them as hereinafter stated.

31 6. That on said 19th day of January, 1911, at about the hour of 9:45 o'clock A. M., while walking in a northerly direction along and upon said beaten foot path, or track, between the westerly rail of said side track and said coal shed, at a distance of about seventy-two feet, more or less, north of said cinder pit, and while in the discharge and performance of his said duty, and while assisting in and supervising the extinguishment of a fire and threatened conflagration, which had originated in said cinder pit, he was violently struck by one of defendant's said locomotive engines, running in a northerly direction on said side track, in charge of and driven by another engineer and a fireman in defendant's employment, and in the discharge and performance of their duties as employees of said defendant. That said plaintiff

was thereby violently thrown against said coal shed, knocked down and rolled and dragged upon the ground adjacent thereto, and severely cut, bruised, wounded, gashed, torn, lacerated and maimed. That plaintiff's head and face were badly cut in numerous places, and his skull fractured. That three of plaintiff's ribs were broken and fractured. That plaintiff's arms and legs, and other parts of his body were badly bruised. That plaintiff's left arm and shoulder were severely bruised, crushed and torn, resulting in the permanent paralysis thereof. That because of said injury, plaintiff has been caused great bodily and mental pain and suffering which has been continuous and is continuing. That plaintiff has been and is permanently disabled and incapacitated from performing his said usual duties or other manual labor. That because of said injury, plaintiff has been required to incur expenses of money for surgical and medical services, drugs and other material in the amount and upwards of two hundred dollars. That in all, plaintiff has been damaged in the amount and sum of ten thousand dollars.

32 7. That said injury and damage to plaintiff was caused wholly without any fault or carelessness, negligence or want of ordinary care on his part contributing to said injury.

8. That said injury was caused wholly by and through the fault, carelessness, negligence and want of ordinary care of said defendant and its other employees and in disregard and violation of their said duties to the plaintiff, because, for the reason and in that (a) the construction, arrangement and location of said side track, cinder pit, coal shed and other buildings, facilities, materials and equipment adjacent and pertaining thereto, as aforesaid, were and are unsafe, insufficient, improper, defective, careless and negligent, all of which was known to said defendant and its other employees; (b) said cinder pit was carelessly and negligently permitted by defendant's other employees, in charge thereof, and responsible therefor, to catch fire and produce a threatened conflagration and destruction of said side track at and over said cinder pit, and of said buildings and other property adjacent thereto and in the vicinity thereof, as heretofore stated said fire requiring water to be used in extinguishing it and resulting in the rising of large clouds of smoke and steam to the north of said cinder pit over said side track and between said coal shed and other buildings, and thereby impairing plaintiff's vision; (c) defendant's said employees in charge of and driving said engine, carelessly and negligently failed and omitted to sound or ring, or cause to be sound- or rung, the bell situated upon said engine for the purpose of giving warning to plaintiff or others against such danger, or danger of any kind; (d) without notice to plaintiff, said engine was carelessly and negligently run and permitted to be run by said defendant and its said other employees upon said side track, at and to a point and place
33 thereon north of the extreme southerly end of said cinder pit, contrary to the requirements, rules, custom and practice established and followed by defendant and its employees in said yards, and upon which plaintiff relied, and while said cinder pit and the vicinity north thereof were covered with and surrounded by large,

overhanging clouds of smoke and steam, which rendered it impossible for the plaintiff to see or distinguish objects; and (a) said engine was carelessly and negligently run and driven and permitted to be run and driven by said other employees of the defendant at a careless, negligent and unlawful rate of speed of twelve miles per hour, beyond the control of said other employees, and in violation of the provisions of sections one and two of Chapter twelve, of the Revised Ordinances of the City of Antigo of 1906 pertaining thereto.

Wherefore, the plaintiff demands judgment against the defendant for the sum of ten thousand dollars, together with his costs and disbursements herein.

STEPHEN J. McMAHON,
Plaintiff's Attorney.

P. H. MARTIN,
Of Counsel.

34 STATE OF WISCONSIN,
Milwaukee County, ss:

William H. Gray, being first duly sworn, on oath deposes and says, that he is the plaintiff in the above entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM H. GRAY,
Plaintiff.

Subscribed and sworn to before me this 19th day of February, A. D., 1912.

M. A. MARCHANT,
Notary Public, Milwaukee County, Wisconsin.

My Commission Expires March 25, 1912.

35 (Endorsements:) Original. State of Wisconsin. Municipal Court. Circuit Court Branch. Outagamie County. William H. Gray, Plaintiff, vs. Chicago & Northwestern Railway Company, a corporation, Defendant. Summons and Complaint. State of Wisconsin in Municipal Court for Outagamie County, Filed Apr. 15, 1912. A. O. Danielson, Clerk. Filed Dec. 6, 1912, Clarence Kellogg, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN,
County of Outagamie, ss:

I hereby certify that on the 28th day of February 1912 in the City of Appleton in said County of Outagamie, I personally served the within Summons and Complaint on the above named defendant Chicago & Northwestern Railway Company by serving on and leaving with H. P. Martin, Agent for said Company, by then and

there delivering to and leaving with him a true and correct copy of the same, and that I endorsed on said copy the date of service and signed my name and official title thereto.

Dated Feb. 28, 1912.

M. M. LOCKNEY, *Sheriff*,
By MARTIN VERHAGEN, *Under Sheriff*.

Fee, Service.....	1.00
Mileage 2.....	20
Copy 23 fols.....	2.30
	<hr/>
	3.50

36 STATE OF WISCONSIN:

In Municipal Court, Outagamie County, Circuit Court Branch.

WILLIAM H. GRAY, Plaintiff.

VS.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, a Corporation,
Defendant.

And now comes the above named defendant, by Edward M. Smart, its attorney, and for its answer herein shows to the court and alleges:

1. It admits the allegations of paragraph One of the Complaint.

2. It admits that the general situation, location, position, and measurements of the defendant's yards, buildings, tracks, etc., as set forth in paragraph Two of the complaint are substantially correct, excepting as to the following particulars, to-wit, and as to that it alleges that the following are the true and correct measurements.

The cinder pit is thirteen (13) feet wide and eighty (80) feet long, and two (2) feet nine (9) inches below the rail; that the coal shed is six (6) feet nine (9) inches north of the cinder pit the west side of the track and parallel thereto.

It admits that west of the rail of the side track and the east line of the coal shed there is a space three (3) feet nine (9) inches in width, but denies that there is within said space any beaten
37 foot path or track, or that the plaintiff was required to travel or pass thereon or thereover at any time in the discharge or performance of his duties.

3. It admits that at the time alleged the plaintiff was employed by the defendant as an engine despatcher at the City of Antigo.

4. It alleges that the duties of plaintiff as engine despatcher were as follows:

To get on the engine as it came in off the road and after it had been deposited any where on the round house track by the engineer, to be inspected; to stop the engine on the cinder pit and have the fire and ashes cleaned out; move the engine to the coal shed and have the tender filled with the proper amount of coal, and from there take it to the water tank to be filled with water; after he had

supplied the engine with kindling wood he then took it to the round house turn table, after which he took it to the round house.

Except as admitted in the foregoing paragraph, defendant denies that the plaintiff owed the several duties set forth in paragraph Four of the complaint, and especially denies that he owed any particular or special duty to guard, care for or protect the cinder pit or any particular piece of property, and alleges that the particular duty of looking after any danger by fire in the cinder pit was in charge of the cinder pit men;

Admits that the plaintiff owed the general duty that every employe owes to his master of rescuing and saving property from danger by fire or otherwise when he learns of the same.

38 5. Denies that the defendant or any of its employes, servants, agents or officers disregarded or violated any duty owed to the plaintiff.

6. Admits that on the 19th day of January, 1911, the plaintiff, while on the said premises and near the said coal shed, was struck and injured by one of defendant's engines, but denies that he was walking outside of the track or upon any beaten path, and in that behalf alleges that he was at the said time walking along between the rails of the said side track with his back in the direction from which the said engine was coming, without giving any thought or attention thereto or his own safety.

Denies that he was then in the discharge or performance of any duty, or assisting or supervising the extinguishing of any fire or conflagration.

Alleges that as to plaintiff's injuries, it has no knowledge or information as to the character or extent thereof, and therefore denies the same.

Denies that the plaintiff has been or is permanently disabled ^{from} incapacitated in performing his usual duties or other manual labor.

Alleges that it has no knowledge or information as to the expenses incurred for surgical or medical services, drugs, and other material, and therefore denies the same, and denies that plaintiff has been damaged in any sum whatever.

7. Denies that the plaintiff's injuries were received without fault on his own part, and alleges that they were caused solely by his own negligence.

8. Denies that plaintiff's injuries were caused either wholly or in part by or through any fault or negligence on the part of the defendant or any of its employes.

39 Denies that the construction, arrangement or location of the side track or the cinder pit or coal shed, or any other building, or any facilities, material or equipment on the premises, or any of them were unsafe, insufficient, improper, defective, careless or negligent, or that the defendant or any of its employees had any knowledge thereof.

Denies that the cinder pit was carelessly or negligently permitted by any one to catch fire, or to produce a conflagration or destruction

of the side track or cinder pit, or any other property, or any buildings in that vicinity or elsewhere.

Admits that there *was* some hot coals in the said cinder pit, and that water was thrown thereon, and alleges that the same was with the knowledge and consent and under the direction of the plaintiff, and that the clouds of steam arising therefrom were caused by the plaintiff and well known to him.

Denies that the employees in charge of the said engine failed or omitted to sound or ring the bell thereon, and alleges that the said bell was, at and prior to the time of the accident, being continuously rung.

Denies that said engine was carelessly or negligently run or permitted to be run by the defendant or any of its employees upon the said side track at any point thereon, and denies that the same was run contrary to any requirement, rule, custom or practice established or followed by defendant or any of its employees, and denies that the plaintiff relied upon any requirement, rule, custom or practice;

Denies that the said engine was run at a careless, negligent or unlawful rate of speed, or that it was run at the rate of twelve miles per hour, or that it was beyond the control of employees so running the same, and denies that it was being run in violation of any ordinance of the City of Antigo, and denies that there was any such ordinance as set forth in the complaint.

40 9. Further answering, defendant denies each and every allegation in said complaint not hereinbefore expressly admitted, qualified or explained.

10. Further answering defendant alleges that this action was not commenced until February 28th, 1912, and no notice of injury was given, made or served, as required by Section 4222 of the Wisconsin Statutes of 1898 as amended, and defendant pleads failure to give such notice as a defense hereto.

Wherefore defendant demands judgment that the complaint of the plaintiff be dismissed and that it have and recover its costs and disbursements herein.

EDWARD M. SMART,
Attorney for Defendant.

41 STATE OF WISCONSIN,
Milwaukee County, as:

Edward M. Smart, being first duly sworn on oath, says that he is the attorney for the defendant in the above entitled action.

That he makes this verification for and on behalf of said defendant and is authorized so to do.

That deponent has read the foregoing answer and knows the contents thereof; that all the material allegations of the same are within deponent's belief, and deponent verily believes the same to be true.

That the grounds of deponent's belief on the subject are the records and documents of defendant relating to said matters in deponent's possession and conversations with the officers and agents of the defendant.

That the reason why this verification is not made by the defendant

is that defendant is a corporation and none of its officers reside in the county where deponent resides.

EDWARD M. SMART.

Subscribed to and sworn to before me this — day of —.

K. M. CROWLEY,

Notary Public for Wisconsin.

42 (Endorsements:) Original. Municipal Court. Circuit Court Branch. Outagamie County. William H. Gray, Plaintiff, vs. Chicago & Northwestern Railway Company, Defendant. Answer. Due service of a copy of the within answer is hereby admitted this 10th day of April 1912. Stephen J. McMahon, Attorney for Plaintiff. Edward M. Smart, Milwaukee, Wis. Attorney for C. & N. W. Ry. Co.

43 STATE OF WISCONSIN:

Municipal Court, Circuit Court Branch, Outagamie County.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, a corporation,
Defendant.

At the General Term of the Municipal Court in and for Outagamie County, State of Wisconsin, Begun and Held at the Court-House in the City of Appleton, in Said County, for the Year 1912, and on the 4th Day of December, 1912, a Day of Said Term.

Present, Hon. Thomas H. Ryan, Municipal Judge, Presiding.

Judgment.

This action being at issue and having been brought on for trial before the court and a jury, on the 15th, 16th, 17th, 18th, 19th, and 20th days of July, 1912, and the issues having been tried, and a special verdict which is of record having been duly rendered on the 20th day of July, 1912, in words and figures as follows:

STATE OF WISCONSIN,
County of Outagamie:

In Municipal Court for Said County.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Special Verdict.

1. Was the plaintiff on the 19th day of January, 1911, struck by one of defendant's engines and injured?

Answer. Yes. (By the Court.)

2. Did the defendant prior to the day of the plaintiff's injury cause an order to be issued providing in substance that engines delivered on the coal shed track to be despatched should stop south of the cinder pit?

Answer. Yes.

3. If you answer question numbered 2 "yes," was such order abrogated prior to the day of the plaintiff's injury?

Answer. No.

4. If you answer question numbered 2 "yes," and question numbered 3 "no," then was Engineer Kane guilty of negligence in running his engine north of the cinder pit in violation of such order at the time plaintiff was injured?

Answer. Yes.

5. If you answer question numbered 4 "yes," then was such negligence of Engineer Kane a proximate cause of plaintiff's injury?

Answer. Yes.

6. Was the engine bell of the engine that struck plaintiff ringing at and immediately prior to the time of plaintiff's injury?

Answer. No.

7. If you answer question numbered 6 "no," then was Engineer Kane guilty of negligence in failing to cause the engine bell to be rung immediately prior to the time of plaintiff's injury?

Answer. Yes.

8. If you answer question numbered 7 "yes" then was such negligence a proximate cause of plaintiff's injury?

Answer. Yes.

9. Under the circumstances existing was Engineer Kane guilty of negligence in running the said engine north of said cinder pit to the place where it struck plaintiff at the rate of speed at which he was running?

45 Answer. Yes.

10. If you should answer question numbered 9 "yes" then answer this: Was such negligence a proximate cause of plaintiff's injury?

Answer. Yes.

11. Was the plaintiff guilty of any negligence which proximately contributed to his injury?

Answer. No.

12. If you should answer the 11th question "yes," then answer this: Was the said negligence of Kane greater than what of the plaintiff?

Answer. (No answer.)

13. If you should answer the 12th question "yes," then did such negligence contribute in a greater degree to the plaintiff's injury than did that of the plaintiff?

Answer. (No answer.)

14. What sum will justly compensate the plaintiff for the injuries sustained by him?

Answer. \$7,815. Seven thousand eight hundred and fifteen dollars.

(S'd)

CHARLES FOSS, Foreman.

And an order having been made and entered by the court in this action on the 29th day of November, 1912, ordering and directing that judgment be entered in the above entitled action upon the said special verdict in favor of the plaintiff and against the defendant with costs.

46 Now on motion of Stephen J. McMahon, attorney for the plaintiff and P. H. Martin of counsel for the plaintiff, and after hearing them for the plaintiff, and Edward M. Smart attorney for the defendant,

It is adjudged, that the said plaintiff William H. Gray recover of said defendant Chicago & Northwestern Railway Company the sum of seven thousand eight hundred and fifteen (7,815) Dollars, his damages, as found by the jury in their said special verdict, with his costs and disbursements of this action taxed at the sum of one hundred and seventeen dollars and fifty-one cents (\$117.51) making together the sum of seven thousand nine hundred and thirty-two dollars and fifty-one cents (\$7,932.51.)

47 (Endorsements:) Original. State of Wisconsin: Municipal Court: Circuit Court Branch: Outagamie County. William H. Gray Plaintiff, vs. Chicago & Northwestern Railway Co. a corporation, Defendant. Judgment. Filed, Dec. 6, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis.

48 In Municipal Court, Outagamie County, Wisconsin.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY Co., Defendant.

STATE OF WISCONSIN,

County of Outagamie, ss:

I, A. O. Danielson, Clerk of the Municipal Court in and for said county and State, do hereby certify that the papers hereto attached are the original records necessary to this appeal pursuant to Supreme Court rule one, filed of record in this office, in the above entitled action, and that the same are hereby transmitted to the Supreme Court of the State of Wisconsin pursuant to such appeal.

In witness wherein, I have hereunto set my hand and affixed the seal of said Court this 5th day of December, A. D. 1912.

[SEAL.]

A. O. DANIELSON, Clerk.

(Endorsements:) Filed, Dec. 6, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis.

49 STATE OF WISCONSIN,
Outagamie County:

In Municipal Court for said County.

WILLIAM H. GRAY, Plaintiff,
vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

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Defendant rests.

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51 STATE OF WISCONSIN:

Municipal Court, Outagamie County, Circuit Court Branch.

W. H. GRAY, Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

GENTLEMEN: Please take notice that annexed is a copy of the bill of exceptions proposed on the part of the defendant in this action, and that the same contains all the testimony taken in this ac-

tion, set forth by question and answer and certified as such by Margaret E. Hogan, stenographic reporter on the trial thereof.

EDWARD M. SMART,
Attorney for Defendant.

Dated March 10, 1913.

To Mr. Stephen J. McMahon, Plaintiff's Attorney; P. H. Martin, of Counsel.

Due service of a copy of the within proposed bill of exceptions admitted this 10th day of March, 1913.

STEPHEN J. McMAHON,
Attorney for Plaintiff.

52 STATE OF WISCONSIN:

Municipal Court, Outagamie County, Circuit Court Branch.

W. H. GRAY, Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Be it remembered that this action was brought on for trial at the June, 1912 term of said court, at the court house in the City of Appleton, beginning on the 16th day of July, 1912, before the court, Hon. Thomas H. Ryan, Municipal Judge, presiding, and a jury.

Plaintiff present in person and represented by Stephen J. McMahon, his attorney and P. H. Martin of counsel.

Defendant appeared by Edward M. Smart, its attorney.

Whereupon the following proceedings were had:

53 STATE OF WISCONSIN,
County of Outagamie:

In Municipal Court for Said County.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Testimony taken July 16th to July 20th, 1912.

July 15, 1912, jury drawn.

July 16, 1912, 9 A. M. case called. Plaintiff present in person and represented by his attorneys, S. J. McMahon, of record and P. H. Martin of counsel.

Defendant appears by Edward M. Smart, its attorney.

Jury sworn and examined.

54 The plaintiff asks that the bulletin in question in this case be produced by counsel for the defendant so that it can be here in evidence.

By Att'y SMART:

The bulletin was not one that was recorded. The bulletins are all numbered. Search has been made for it but it cannot be found. It was simply in the nature of a foreman's orders.

FREDERICK KRUSE, called as an adverse witness, being first duly sworn, testified as follows:

Cross-examined by Att'y P. H. MARTIN:

Q. Mr. Kruse, you were on the 19th day of January, 1911, in the employ of the defendant company as fireman?

A. Yes sir.

Q. How long had you been in its employ at that time?

A. In the company's employ? About six years all told.

Q. You were on the engine that struck Mr. Gray, the plaintiff in this case on that day?

A. As I understand it I was on the engine that was supposed to have struck Mr. Gray.

Q. That engine passed over the cinder or clinker pit on toward the round house on that day?

A. Yes sir.

Q. About what time of the day?

A. Between ten and eleven in the morning.

Q. Are you able to fix it any nearer?

A. No sir, I don't believe I could.

Q. You registered in did you not?

A. Yes sir.

Q. Do you know what time you registered in that day?

A. I don't remember.

Q. Who was the engineer in charge of the engine as you passed in to the clinker pit and on towards the round house?

A. William Kane.

Q. At what point beyond the clinker pit did you first stop?

A. Right opposite the water tank.

55 Q. The track on which you came in at that point runs in a northerly and southerly direction?

A. Yes sir.

Q. What was occupying your mind as you passed in over the clinker pit at that time, that is, what were you thinking about?

A. Well, that would be a pretty hard matter for me to say—what I was thinking about.

Q. You aren't able to say are you?

A. No, I couldn't recall what I would be thinking about about that time.

Q. Are you able to tell what you were thinking about at any time after you passed over the clinker pit and before your engine stopped at the water tank?

A. I was probably thinking about—

Q. No, not probably, what were you thinking about as a matter of fact, if you know.

A. I don't believe I can answer that question.

Q. Are you able to tell us where you started from on your run that day or the night before?

A. I think it was Fond du Lac.

Q. You aren't sure of that are you?

A. No sir, I am not.

Q. You have been examined before?

A. Yes sir.

Q. Are you able to explain why you can't tell the jury where you started from on that run?

A. Well, we as a rule, don't keep track of every day that we work.

Q. Don't you keep track of every day that you work?

A. I couldn't keep track of every day that I worked two years ago and where I started from.

Q. Then you have no recollection of the time and place you started from on that particular run?

A. No sir, I haven't.

Q. Have you made any attempt since that examination before the commission to find out?

A. No sir, I don't believe I did.

Q. How far is it from the place that you left your train, following the track that your engine passed over, to the clinker pit, about—I don't care for exact figures?

A. Oh, about 100 rods I guess.

Q. While the road the engine took was about a mile?

A. About a mile, yes, it would be.

56 Q. But you left your train about 100 rods from that point of the clinker pit?

A. Yes, up the track.

Q. South?

A. No, northeast a little.

Q. So after pulling your train up north east of the clinker pit you cut off your engine and backed down south?

A. No, we cut off and went north to the north house.

Q. The train was registered then backed down the main line then in on the clinker pit tracks?

A. Yes sir.

Q. Then went north?

A. Yes sir.

Q. You were on the west side of the engine as you proceeded north over the clinker pit?

A. Yes sir.

Q. How soon after you stopped did you learn Mr. Gray had been hurt?

A. About twenty minutes.

Q. Was it that long?

A. Yes, I think it was about that long.

Q. You understood then that it was claimed your engine struck him?

A. I didn't at that time, No.

Q. How soon did you learn that it was claimed your engine was the one that struck him?

A. I believe it was along in the afternoon or evening.

Q. You don't know what time?

A. No sir, I don't.

Q. How long had you been in the habit of coming in there with your engine, up to that clinker pit?

A. Up to the clinker pit and pass through there?

Q. How long had you been in the habit of doing that?

A. It was always customary to pass through there if the track was clear.

Q. You knew Mr. Gray?

A. Yes sir.

Q. You knew a number of the men employed in and about the yard?

A. Yes sir.

Q. And cinder pit?

A. Yes sir.

Q. Employees occupy that space quite generally between the clinker pit and the round house, do they not, in passing back and forth on the track itself?

A. Why, I believe they do.

57 Q. You have seen it done, haven't you?

A. Yes, I have seen it.

Q. Do you know about how many employees are employed in and about that place?

A. There are two cinder pit men, engine dispatcher and helper.

Q. Foreman there is there not?

A. Round house foreman? A. Yes sir.

Q. And other men employed in the round house?

A. Yes.

Q. So there were quite a number of men who had occasion to work in that immediate vicinity, is that true?

A. Well, I don't know as there would be probably anybody that ever worked there but that probably would pass by there.

Q. You knew about the presence of that little shanty on the right of the track?

A. Yes sir.

Q. What did you understand that was used for?

A. For a place for the engine dispatcher and helper to stay while waiting for engines.

Q. After an engine was pulled in the yard and stopped you knew the engineer had no further duty concerning the engine?

A. Yes sir.

Q. Then it was given to the clinker pit men and they saw to the fire being knocked out of the engine and water put on and that the engine was made ready for the next trip?

A. Yes sir.

Q. And the engine dispatcher and helper did that work?

A. Yes sir.

Q. Did you know about this bulletin that has been mentioned claiming to forbid the engineers from proceeding north of the clinker pit with their engines?

A. I knew of a bulletin; I don't know as it forbade them to go north of the clinker pit.

Q. Did you read that particular bulletin?

A. Yes sir.

Q. If you did what did it provide?

A. That engines shouldn't be stopped on a certain switch.

Q. Didn't it particularly provide that the engines shouldn't go north of the clinker pit?

A. I couldn't say.

Q. You say you remember of reading the notice?

A. Yes sir.

Q. How long did that bulletin notice remain on the bulletin board?

A. That I couldn't state.

Q. Was it on the bulletin board when you saw it?

A. It was.

58 Q. You have a regular bulletin board where some superintendent or officer notifies or gives directions to the employees?

A. Yes.

Q. That is kept where?

A. In the round house in the enginemen's room where they register in.

Q. You are supposed to read and observe these directions?

A. Yes sir.

Q. Are you able to give us any idea when that bulletin disappeared?

A. No sir, I haven't any idea.

Q. You knew it to be a fact that a great many engines did stop, that is, that put up south of the clinker pit?

A. I couldn't say; I suppose they did.

Q. There wasn't any particular reason that you took your engine north of the cinder pit except as a matter of convenience and to save you walking?

A. Not as I know of.

Q. Mr. Kruse, I suppose it is part of your duty to keep a pretty close lookout ahead to see that no one is in danger and to observe the condition of the track as you pass along?

A. Yes sir.

Q. Do you recall what you were doing on this particular occasion as you were passing over the clinker pit?

A. Yes, sitting on the seat looking out ahead.

Q. You were not shovelling coal?

A. No sir.

Q. You had nothing to do except perform that particular duty?

A. No sir.

Q. Why didn't you see Mr. Gray? What is your explanation of the fact that you failed to see Mr. Gray?

A. Well, there was steam rising from the cinders of the pit.

Q. Was it a cold day?

A. Yes, I believe it was.

Q. The steam rising from the cinders on the pit was sufficient to

entirely obscure Mr. Gray, even though he had been standing right ahead—I mean in between the west rail of the track and the coal shed?

A. I believe so.

Q. In the line of your vision had not your vision in front been obscured by the steam you would have seen Mr. Gray?

A. Yes sir.

59 Q. If he was in there the only reason why you couldn't see him and didn't see him was because of the steam or vapor arising from the cinder pit?

A. Yes sir.

Q. You were looking there constantly enough to see him if it wasn't for the vapor and steam?

A. Yes sir.

Q. Were you looking through a glass in front of your seat?

A. Yes.

Q. It wasn't a clear open space?

A. No sir, glass.

Q. Do you know whether or not that glass had become steamed or covered in any way so as to impede your vision?

A. No sir.

Q. In running a long distance it does become steamed and covered with cinders and soot and smoke from the cars?

A. We usually wipe that off when it gets dirty.

Q. Did you wipe it off on this occasion?

A. I can't recall.

Q. If Mr. Gray's head extended above the steam and vapor you would have seen that?

A. Yes sir.

Q. About how high in your judgment was this steam and vapor above the ground?

A. Six or eight feet I should judge.

Q. Were you over it or did it rise still higher?

A. We were over it.

Q. Do you mean to say that it didn't rise higher than this eight feet?

A. I don't believe it did because I could see over the top of it.

Q. You sat about how high from the ground?

A. About six or eight feet.

Q. It was a large size engine?

A. One of the large sizes.

Q. Pretty near eight feet isn't it? Do you know what the dimensions of the drive wheel is on that size engine?

A. Sixty-seven inches.

Q. Your seat was considerable higher than the top of the drive wheel?

A. Yes sir.

Q. I understand you now to claim that you saw no trace of Mr. Gray at all on that day after you crossed the clinker pit or before you stopped at the water tank?

A. No sir.

Q. You were keeping a constant lookout on that side of the engine?

A. Yes sir.

60 Q. And the thing which obscured your vision was the presence of steam and vapor rising from the clinker pit?

A. Yes sir.

Q. And the wind was carrying the steam and vapor in the direction in which you were moving?

A. I couldn't say for sure.

Q. The presence of a large coal shed and other buildings through there would tend to confine it in there any way?

A. Yes sir.

Q. There was both smoke and steam rising from this clinker pit?

A. Yes, I believe there was.

Q. And there was some smoke being emptied from the smoke stack of your engine?

A. I couldn't say — to that but I don't believe there was any smoke.

Q. Not any great volume?

A. No sir.

Q. You didn't feel anything when the engine struck Mr. Gray?

A. No.

Q. I suppose in passing along there, striking a man and knocking him down you wouldn't feel it in any way?

A. I don't believe we would.

Q. What rate of speed were you going that time, after passing over the clinker pit and while passing over the clinker pit and before you stopped?

A. We couldn't have been going over six miles—six to eight miles an hour.

Q. Might it not have been ten miles an hour?

A. No sir, I don't think so.

Q. In other words, without thinking of the speed you were moving along there, but forming a judgment some months later, within two, three or four months, could you give the speed with any degree of certainty or sureness at which you were running?

A. We don't as a rule generally go in in there over six or eight miles an hour.

Q. You think you were going about as usual?

A. Yes sir.

Q. Haven't you testified you were going about eight miles an hour?

A. I think between seven and eight or six to eight.

Q. Might it have been as high as ten miles an hour?

A. I couldn't say whether it was or not.

61 Q. Sitting in your position, in the engineman's position for that matter, either of you had the same opportunity to the view ahead?

A. Yes, sir.

Q. How close in front of the engine can you see the roadbed between the rails?

A. I don't believe over 20 feet.

Q. About 20 feet ahead?

A. Yes, sir.

Q. If a man stood between the rails and you were approaching, when the engine got within 20 feet of him, or less, he would no longer be within the line of your vision, as you and engineman sat in your positions in the engine, is that right?

A. I think the distance and his height would make some difference.

Q. Suppose it was a block of wood or something of that kind, say a foot high and a foot square, resting between the rails, near to the pilot nose or the engine, could you see that?

A. Between 15 and 20 feet I believe we could.

Q. As you looked ahead this time could you see the roadbed and the rails while you were passing over this clinker pit and through this thick smoke and steam and vapor?

A. Couldn't see it on my side that is, the rail.

Q. You don't know whether the density of this fog was the same on that side as on the engineman's side?

A. No, sir.

Q. You were not paying any particular attention to it?

A. No, sir.

Q. Neither did you have the rate of speed in mind so as to form any judgment of the rate of speed you passed in there?

A. No, I don't think so.

Q. Suppose your engine, under the conditions existing there that morning, and the condition of the vapor, effected the rails so they were a little wet?

A. I couldn't say as to that. It might be passing right over the cinder pit on each side.

Q. With the conditions existing there that time, and the rate of speed as you passed over clinker pit, after you begun to slow-down, within what distance would you stop that engine,—50 or 60 feet?

A. I could stop within 20 feet.

62 Q. Are you sure about that?

A. I am pretty sure.

Q. Defendant's Exhibit "1" shows the location of the tracks and buildings with reference to the tracks and the objects there indicated in a general way, as they were at the time of the accident, doesn't it?

A. Yes, sir.

Q. Now, wouldn't the discharge of steam, the exhaust stay on the track inside always so that it would form ice?

A. Perhaps.

Defendants' Exhibit "1" offered in evidence by the Plaintiff in connection with the examination of the witness.

Q. And you haven't any idea of about how many hours you had been on duty at the time you pulled in there over the cinder pit?

A. Approximately 10 or 12 hours I guess.

Q. What have you got to base your guess on, Mr. Kruse? You

don't know what point you left or how far you traveled or what hour you left. Is there any way by which you can tell how long you had been on duty?

A. By looking up the train sheet.

Q. Have you looked up the train sheet?

A. No sir, I haven't.

Q. So at the present time you wouldn't be able to tell?

A. No sir I couldn't.

Q. You had nothing to do with the ringing of any bell as you came in over the cinder pit to advance to the point where you stopped your engine, had you?

A. No, sir.

Q. That wasn't any of your business to ring the bell?

A. It was if there wasn't an automatic bell ringer.

Q. That wasn't your duty at that place at that time?

A. No, because the bell was ringing.

By Mr. MARTIN: I move to have the answer struck out as not responsive to the question.

Motion granted.

Exception by defendant.

Q. You didn't have anything to do with the ringing of the bell at that time and that place?

A. No, sir.

Q. Do you know about how far the end parts of that engine extended over the rails?

A. About 18 inches.

63 Q. It was one of those great big heavy engines?

A. Yes sir.

Q. Do you know anything about the tonnage of it?

A. No sir.

Q. Do you know the number of that engine?

A. 1066 I think it was.

W. H. KANE, called as an adverse witness, by the plaintiff, being first duly sworn, testified as follows:

Cross-examination by Att'y MARTIN:

Q. Were you in the employ of the Chicago Northwestern Railway Company on the 19th of January, 1911, at the time Mr. Gray was hurt?

A. I was.

Q. As an engineer?

A. Yes sir.

Q. You operated the engine that is supposed to have struck him?

A. Yes sir.

Q. When did you first learn that it was your engine struck Mr. Gray as you came in that day?

A. I learned that Mr. Gray was injured after arriving at the round house for registering in.

Q. How soon was that after you passed over the cinder pit?

A. Probably 20 or 30 minutes.

Q. Might it have been as low as ten?

A. No sir.

Q. You operated the engine as you came in approaching the cinder pit and passed over the cinder pit on north to the round house where it stopped near the water tank?

A. Yes sir.

Q. Can you tell us what was occupying your mind at that time?

A. At that time I was thinking if the track was clear ahead of

us.

Q. Clear of what?

A. Cars and engines.

Q. What did you go up there for?

A. I have always went up there if it is clear.

Q. What did you go up there for on this occasion?

A. I considered that I had a perfect right to go up there.

Q. What business had you? What reason did you have to take your engine up there? What business had you with your engine up there? Did you have any work for your engine up
64 there?

A. I had no work for the engine, No.

Q. You knew that if the engine was stopped north of the cinder pit that the engine dispatcher was compelled to run it back again south of the cinder pit to do his work on it?

A. Yes.

Q. Back it up?

A. Yes sir.

Q. How far did you run it across the cinder pit north of the cinder pit?

A. To the water tank.

Q. How far is that?

A. I should judge about 180 feet.

Q. And you did that to avoid walking that distance did you not?

A. Yes sir.

Q. I should think a walk would have been an agreeable change to you at that time. Gotten lazy and wanted to ride had you? The only reason you had was to avoid that distance?

A. It might be that I was tired when I got that far.

Q. If you were tired then you wanted to avoid walking? Were you tired that time?

A. A man is generally tired after he gets in his run.

Q. Where were you going after your engine stopped?

A. Going to the round house.

Q. What did you have to do there?

A. Well, I had to carry what clothes I had and take them up there, put them in a cupboard provided for that purpose and register in and report the necessary work to be done on the engine.

Q. That was all?

A. That was all.

Q. Then go about your business whatever it might be elsewhere?

A. Yes.

Q. You had been examined before in this action before a commissioner at Antigo?

A. Yes sir.

Q. You knew about the existence of this so-called bulletin?

A. I remember such a bulletin.

Q. That bulletin provided that engines should stop south of the cinder pit did it not?

A. That was part of the bulletin I believe.

Q. Do you know who promulgated that bulletin or caused that to be put up there?

65 A. I believe it was Mr. Armstrong.

Q. He was at that time in what position?

A. Assistant-superintendent.

Q. Of that division?

A. Yes sir.

Q. How long before this accident to Mr. Gray had this bulletin been put up there?

A. I don't know.

Q. About?

A. Don't remember.

Q. How long had you known of it having been put up?

A. It was sometime that same winter—I don't remember when it was.

Q. That would be the winter of 1910 and 1911?

A. Yes sir.

Q. How long to your knowledge was that bulletin on the bulletin board?

A. I don't remember how long it was.

Q. This bulletin board as its name indicates is a board where orders and directions to employees are posted or written on is it not?

A. Yes sir.

Q. And it becomes your duty to examine that bulletin board every day you are on duty?

A. Yes sir.

Q. Every trip you go out?

A. Yes sir.

Q. In view of that fact can you tell us when you last saw this bulletin concerning the stopping of engines south of the cinder pit?

A. I cannot.

Q. Did it in fact disappear sometime before the happening of this accident?

A. I don't know.

Q. So that your state of mind concerning that bulletin is that you don't know whether it was in fact on the board at the time this accident happened or not?

A. I don't.

Q. You never saw any bulletin revoking that one?

A. No sir.

Q. Why was it you took your engine north of that cinder pit in violation of that bulletin? Was it to save you walking?

A. Well there could be no other reason.

Q. In other words, you did it several times?

A. I have always done that if there were no engines in there?

Q. This accident happened in January, 1911, with reference to that what time in the winter did that bulletin first appear?

66 A. I don't know. I don't remember.

Q. Was it before the holidays?

A. I couldn't say whether it was before Christmas or around Thanksgiving.

Q. It was before freezing weather?

A. I believe so.

Q. Part of the bulletin related to ice forming on the switch?

A. Yes.

Q. Now, will you tell us why you went north of the cinder pit in violation of the bulletin with your engine on this and other occasions?

A. That bulletin as I remember it read like this "Engines coming into Antigo will stop south of the cinder pit on account of stopping the switch leading to the wrecking track.

Q. That is the track on which the wrecking cars are situated?

A. Yes.

Q. Go ahead and give us the further reading of the bulletin?

A. That is the bulletin as I remember it.

Q. Is that all of it?

A. That is all that I remember—that is as I remember the bulletin.

Q. It was dated?

A. I suppose it was, yes.

Q. You don't remember the date?

A. No sir.

Q. Isn't it a fact that the instructions or provisions were in different bulletins, that the provision for stopping south of the cinder pit simply provided that you should stop south of the cinder pit.

A. No, sir, not to my knowledge.

Q. So you concluded that regardless of the fact that all engines coming from the south should stop south of the cinder pit you would go through to the north, provided you could go north and did not stop your engine in such a way as to stop where it formed ice?

A. Yes sir.

Q. You can give no reason why you couldn't stop south of the cinder pit?

A. No.

Q. So you took it in your own hands to go north?

A. As long as I didn't stop on this switch I considered it all right.

Q. That is, if I interpret your testimony right, you on all occasions when you pulled in you run your engine across north of the cinder pit before you stopped?

A. If the track was clear, yes.

67 Q. It never occurred to you that that stopping south of the cinder pit might be intended to protect the lives of the

men working around there as well, in a place where fog and smoke and vapor would obscure a person?

A. That was the furthest from my mind.

Q. You knew men did work up in there?

A. Yes sir.

Q. And quite a number of them?

A. Yes sir, perhaps a half dozen men.

Q. And in doing their work they would move up and around the track and between the rails?

A. Not necessarily.

Q. They didn't go through the air did they?

A. I suppose not.

Q. I am asking what you saw as you came in, di-n't you see men go down the track and between the rails of the track and some at the side of the track?

A. Yes.

Q. You knew where this little shanty was?

A. Yes sir.

Q. You say they had that for the purpose of the engine dispatcher and the helper I believe.

A. Yes, when they had nothing to do but wait for an engine to come in they staid there.

Q. They would stay in there out of the severe weather?

A. Yes.

Q. It stood right close to the east rail of the track?

A. Yes.

Q. What is it? A box car cut in two?

A. I believe that is what it is.

Q. Isn't it a fact that there is frequently rising from this cinder pit vapor, smoke and steam?

A. Yes sir.

Q. Engines are cleaned and the fire knocked out on the pit every day, are they not?

A. Yes sir.

Q. And a good many of them?

A. Yes sir.

Q. And these coals among them have live coals which hold fire for a considerable length of time?

A. Yes sir.

Q. Do they also exhaust the engine which is hostled, exhaust the steam from the engine while standing there on the cinder pit track, blow off the steam?

A. That is optional with him, I think.

Q. Does he do it sometimes?

A. Sometimes they do I suppose.

Q. They have a hose there for the purpose of throwing water on these live coals?

A. They have a hose there, yes.

68 Q. I show you photograph, defendant's Exhibit "2," and call your attention to the cinder pit, hose attachment fastened to the pipe immediately west of the cinder pit?

A. Yes sir.

Q. Know what it is used for?

A. Yes sir.

Q. It is used to throw water upon the live cinders that are knocked from the engines that are cleaned on the cinder pit is it not?

A. Yes sir.

Defendant's Exhibit "2" offered in evidence in connection with the cross-examination of the witness.

Q. It is in daily use is it not?

A. I couldn't say.

Q. Well, at least it is commonly used is it not?

A. Yes sir.

Q. Whenever it is used to throw water on the live coals it is likely to cause vapor and steam to arise?

A. It is.

Q. And obscure the vision at that time?

A. Yes.

Q. The work of these men who have occasion to work around there is principally between the cinder pit and the round house north of there, is it not?

A. Yes sir.

Q. That is, they have no particular work south of the cinder pit—around the cinder pit they get the engines and bring them to the cinder pit and go on north?

A. Yes sir.

Q. And then come back and get another engine?

A. Yes sir.

Q. Then the space or area is from just south of the cinder pit to the round house north?

A. Yes.

Q. You never talked with any superior officer with reference to what the construction was or what was intended to be meant by that bulletin?

A. No sir.

Q. As you approached the cinder pit on this time in question you of course observed a cloud of smoke and steam or whatever it was or might have been, hovering over the cinder pit and over the track?

A. Yes sir.

Q. About how large a volume did you observe and in what direction was it passing?

A. It varied from three to eight feet high I should judge approximately.

69 Q. A thick up and down mass, some places higher and some places lower?

A. Yes sir.

Q. Some places dense and some places light?

A. Yes sir.

Q. And the wind was carrying it in what direction?

A. I couldn't say.

Q. Did it cover the track in front of you?

A. It covered the track at the cinder pit.

Q. And beyond the cinder pit did it cover the track also?

A. I don't think so.

Q. Do you mean to say it arose straight over the cinder pit and didn't extend north of it at all?

A. I wasn't in a position to see; I saw the steam coming from the cinder pit.

Q. You were in a position to see after you crossed the cinder pit whether or not you were still in fog and vapor and smoke?

A. There wasn't any fog at any time.

Q. What I mean by fog is the vapor and steam and smoke rising there?

A. I couldn't say.

Q. You testified at Antigo that there was some six or eight feet or cloud of this stuff before you?

A. I was over that—I was higher.

Q. You were higher?

A. Certainly.

Q. This was along the ground and extended about six or eight feet?

A. Yes sir.

Q. Did it settle down nearer to the ground than you were, so you could look over it?

A. Yes sir.

Q. Did you see Mr. Gray as you advanced in there?

A. No sir.

Q. Were you looking or on the look-out for any person that time, any person or persons between the rails or near the track?

A. Yes.

Q. Were you keeping a lookout for that particular purpose?

A. Yes.

Q. And you saw no one on that side?

A. There was no one on my side any place.

Q. How fast were you going as you crossed the cinder pit track before you slowed down for the stop?

A. I don't remember how fast I was going—possibly between six and ten miles an hour.

Q. Did you make a report of this accident to the company afterwards?

A. Yes sir.

Q. In which report you did state the rate of speed did you?

A. I believe so, that is generally made in those reports.

Q. And in that report you stated it at what?

Objected to as immaterial. Objection over ruled.

Exception by defendant.

Q. Are you able to state at what rate of speed you reported it?

A. In my answer from six to ten miles I mean approximately. I may have been going slower than six but no faster than ten; what-

ever report I did make I was going that fast because I remembered better than that I can today.

Q. Didn't you report you were going eight miles an hour?

A. If I did I was going at that.

The plaintiff asks the defendant to produce the report.

By Att'y SMART: I believe we are not required to produce any report of witness to explain that explained anything as to this particular accident.

EDWARD M. SMART, being first duly sworn testified for and on behalf of the plaintiff as follows:

Direct examination by Att'y MARTIN:

Q. Mr. Smart, you are the attorney for defendant in this case

A. Yes sir.

Q. Rather with the preparation of the defense in this action?

A. Yes sir.

Q. Were you served by the plaintiff with a notice to produce papers, documents, etc. that had any bearing upon this case?

A. I received such notice.

Q. Look at this instrument which is entitled, "Notice to Defendant to produce papers, etc. a copy of this Exhibit "A" was served upon you was it not?

A. Yes sir.

Q. You heard me ask the last witness, Mr. Kane, whether he sent a report of this accident to the defendant company after the accident happened did you not?

A. Yes sir.

Q. And he said he did?

A. I so understood

Q. Have you that report in your possession among your papers here now?

A. I object to that question and claim that the furnishing of any papers in relation to the testimony of the witness by my client and myself is confidential; that the matter related simply to the preparation of our defense and they have no right to ask me what I procured in that matter any more than they have to ask me for my brief or my private letters or to come on the stand and tell what my witnesses are going to swear.

Q. The plaintiff objects to your stating anything unless you are going to produce it. You can produce it if you want to unless you have something to conceal.

A. I object to your making a statement that there is anything to conceal in it and at the same time I refuse to produce it.

By the COURT:

Q. To whom was that report made?

A. It was apparently to the company in general, not to any particular officer.

Objection over ruled. Exception.

Q. You have that report in your possession have you, Mr. Smart?

A. I have a report here that purports to be signed by Mr. Kane and I am advised by him it is his signature.

Q. We ask now that you produce it for the use of counsel of the plaintiff in connection with the cross examination of Witness Kane who was just dismissed from the stand temporarily?

A. I object to the request and will produce the report only on the order of the Court.

By the COURT:

The objection is over ruled and the witness ordered to produce the report.

The defendant excepts to the ruling of the Court.

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PL'NT'F'S Ex. "B."

Mr. KANE recalled by the plaintiff.

By Att'y SMART: Counsel for the defendant produces the report in question which has been marked Plaintiff's Exhibit "B" under protest, and in fear of commitment for contempt.

By Att'y MARTIN:

Q. Mr. Kane I show you this instrument marked Plaintiff's Exhibit "B" and ask you if that is the report you made of the accident?

By Mr. SMART: It is understood that to all of the questions concerning this report we enter the same objection.

A. Yes sir.

Q. After having examined that report Mr. Kane tell us whether you reported the rate of speed at which you were moving at about eight miles an hour?

A. I did.

Q. You stated a little while ago that if you reported it in your statement that was more likely to be correct than any estimate you could make now?

A. Yes sir.

Q. That report was made on the day it is dated?

A. Yes sir.

Q. What was the date?

A. 26th of January, 1911.

Q. Going at about eight miles an hour on the track as it was at the time in question, operating this engine and tender, within what distance could you stop the engine?

A. About twenty feet.

Q. When you were examined at Antigo didn't you give the distance at 40 feet?

A. I don't remember.

Q. Has your attention been called to the subject as to how soon you could stop it?

A. No sir.

Q. If you gave it at 40 feet when examined at Antigo and at 20 feet now how do you account for the difference?

A. May be 20 feet and may be 40 feet, according to the rails.

Q. According to what?

A. To the condition of the rail.

73 Q. When you testified in Antigo you had better in mind the condition of the rails as they were at the time of the accident?

A. No sir.

Q. Did you think that counsel was asking about rails covered with snow, stopping in the snow or with a train attached?

A. No sir.

Q. At this time in question how were the rails?

A. I don't remember how they were at the time.

Q. You don't know whether they were dry or damp?

A. No sir.

Q. If they were damp it would take a greater difficulty to stop?

A. It would be more likely to slip on the damp rails than on the dry.

Q. Were you going down or up grade in crossing the cinder pit track?

A. Level grade.

Q. Don't you think that 20 feet was a pretty short distance in which to stop an engine running eight miles an hour?

A. When I gave the answer 40 miles an hour I might have had in mind making an ordinary stop on surface blocks. Now I am not positive; but at the rate of speed I was going I know I could stop that engine within 20 feet with the emergency brakes.

Q. Why didn't you make that answer before the commissioner?

A. I probably didn't think of that.

Q. For how great a distance along in front of that engine and near the ground was this bank of vapor, steam and smoke after you passed through the cinder pit going north? You said as you sat there you were over this bank of vapor and smoke, that is you were higher up and could look it over, that it was down near the ground—now, what I want to know is how far it extended north after you crossed the cinder pit track?

A. I don't think it extended north at all.

Q. Do you mean to say that after your engine crossed the cinder pit track there was no smoke at all?

A. I don't remember.

Q. Will you swear there wasn't.

A. I don't know I said.

Q. You heard the testimony of your fireman?

A. Yes sir.

74 Q. Did you look on his side of the track to see?

A. From where?

Q. From where you were in your engine?

A. I couldn't say.

Q. You could see some distance ahead from his side of the track?

A. Yes sir.

Q. I am trying to get at the presence of fog and vapor and smoke that might be carried on over up the cinder pit track. Will you swear that there wasn't any ahead of your engine after you passed the cinder pit track? After you passed over the cinder pit track is what I mean?

A. How far do you mean over the cinder pit track? (There might have been some extended out one or two feet.

Q. Suppose you got 50 or 60 feet beyond?

A. I will swear that there was none 50 or 60 feet beyond.

Q. You think you can swear to that?

A. I know it.

Q. Where did that stuff stay?

A. I don't know.

Q. It didn't rise to the moon?

A. Might have went around the other side of the coal shed. It was just as likely to.

Q. Go east and west?

A. I don't remember.

Q. How was the wind blowing?

A. I don't remember.

Q. Don't know whether it was north or south?

A. I don't.

Q. Might have been directly from the south for all you know?

A. I don't think there was very much wind blowing at all.

Q. Do you know?

A. I don't remember.

Q. Where did you start from on your trip that day?

A. Green Bay, I believe.

Q. Are you sure?

A. I am positive.

Q. Didn't you say on your examination that you didn't know whether you started from Green Bay, Kaukauna or Fond du Lac?

A. I don't remember what I said.

Q. Don't you remember being asked and you said you didn't know whether Green Bay, Fond du Lac or Kaukauna?

A. Well, I don't know and I am not positive now where I started from.

Q. Why did you say "Green Bay I believe"?

A. Because I was on the run that time between Antigo and Green Bay.

75 Q. Didn't the fact that you learned about this accident 30 minutes after impress this trip on your mind particularly?

A. No sir.

Q. How many hours had you been on duty continually at the time of this accident?

A. I don't remember.

Q. You don't know the time of day or the time of night you started from whatever point you did start?

A. No sir, could have found out very easily.

Q. But you haven't found out?

A. No sir.

Q. As a matter of fact you do keep a record of the mileage you make on every trip and report it and get paid for it?

A. Yes sir.

Q. And you are not able to tell this court and jury whether you left Green Bay or Fond du Lac on this trip?

A. No sir.

Q. Spend any time since that time working on a run between Kaukauna, Green Bay and Ashland and over that division?

A. I don't keep any track on my mind at all. I don't know where I run two months ago. Since that time I worked on runs all over that division.

Q. How many times have you encountered smoke, steam vapor or such stuff?

A. Several times.

Q. How are you able to tell us that the vapor didn't extend 50 feet north?

A. Because I know it didn't.

Q. How is it your memory is able to remember that?

A. Because I remember that—I know it.

Q. Still you can't say where you left on that trip?

A. No.

Q. Do you mean to say you left Green Bay, Kaukauna or Fond du Lac?

A. I can't say what point I started from.

Q. You can't say that now but you remember about the vapor?

A. Yes.

Q. On your examination at Antigo wasn't this question put to you:

“Q. How far were you south of the south end of the cinder pit?

A. Probably 60 or 80 feet may be 100 feet I can only guess it.”

A. Yes sir.

Q. That was your figures approximately.

A. Yes sir.

Q. Then you first saw the steam 60 or 80 feet south of the south end of the cinder pit?

A. Yes sir.”

Q. Do you remember those questions?

A. Yes sir.

Q. And did you give those answers?

A. Yes, sir.

76 “Q. How fast were you going at that time?

A. Approximately between six and ten miles an hour. I couldn't say exactly how fast I was going; wasn't going over ten miles an hour.”

— Did you give that answer?

A. Yes sir.

Q. Wasn't going over ten miles an hour?

A. I could stop at the rate I was going within a car length.

Q. What is a car length?

A. About 40 feet.

Q. Going at such a rate of speed you can bring an engine to a stop within 40 feet distance?

A. I could, yes.

Q. Do you remember those questions and did you give those answers?

A. Yes sir.

Q. Was this question — to you:

“Q. When you got to the south end of the cinder pit going north where did you first strike the steam. You couldn't see the track clearly on account of the steam for at least a distance of 40 feet north?”

A. I couldn't see the rail.”

Q. If that is true, then the steam extended at least 40 feet north and obscured that rail didn't it?

A. The cinder pit is probably that long.

Q. How long is the cinder pit?

A. I don't know; may be 100 feet long.

Q. As you were looking over this bank of vapor and smoke you could not tell how far it extended north could you?

A. I could by looking over it.

Q. Did you have it in mind at that time? Were you conscientiously thinking of just how far this bank of vapor and smoke extended for the purpose of remembering it?

A. I had it in mind on account of seeing the steam there.

Q. Did you have it in mind for the purpose of remembering it? Did you try to charge your mind with how far that bank of vapor and smoke extended north of the cinder pit?

A. Not to remember it, no.

Q. How frequently do you meet with vapor and smoke at this place?

A. Quite often.

Q. About how often? How often during a week would you get in there?

A. Might get in there every day and then again might not get in there for a month.

Q. Every time they put an engine in there to knock coals out of they knock down some live coals don't they?

A. Yes sir.

Q. And they have a hose there to turn water on those live coals to quench them?

A. Yes sir.

Q. And whenever they do that there is some vapor and steam arises from the cinder pit?

A. Yes sir.

Q. And it is carried according to the wind?

A. Yes sir.

Q. So you might come in on the track and not see any and you might come in every day and see it every time?

A. Yes sir.

Q. So this is not an unusual thing there?

A. No.

Q. You cannot tell this court and jury when you saw vapor and steam there last before the accident?

A. No sir.

Q. Are you quite sure there was any smoke and vapor there on the day of the accident?

A. Yes sir.

Q. How do you come to remember that, on this particular day?

A. I probably wouldn't remember it only on account of the accident.

Q. Did you have any talk with Mr. Gray after the accident?

A. Yes sir.

Q. How soon after the accident did you talk with Mr. Gray?

A. I believe it was that evening or the next day, I don't remember which.

Q. Where?

A. At his house.

Q. Was it that evening or the next day?

A. Possibly that afternoon or evening of that day I think.

WILLIAM ROCK, called as an adverse witness, being first duly sworn, testified for and on behalf of the Plaintiff.

Cross-examination by Att'y P. H. MARTIN:

Q. Are you in the employ of the defendant company at this time Mr. Rock?

A. Yes sir.

Q. You were at the time Mr. Gray was hurt on the 19th of January, 1911?

A. Yes sir.

Q. What position did you hold at that time?

A. Hostler helper.

Q. That is you helped Mr. Gray?

A. Yes sir.

Q. What did you have to do as helper?

78 A. Knock the fires, take water and wood, and throw switches when necessary.

Q. Where did your work take you?

A. Between the cinder pit and the round house.

Q. And you were passing up and down the track there?

A. Yes sir.

Q. Or on either side of the track?

A. Either side sometimes.

Q. The help all do that?

A. Yes sir.

Q. That is those who had occasion to pass back and forth there?

A. We did.

Q. Every day?

A. Every day.

Q. When you take an engine what do you first do with it?

A. Put it on the pit.

Q. Then what?

A. Have the pan cleaned and knock the fire.

Q. In knocking the fire out would you knock all of the live coals out of the pan?

A. All of them.

Q. After an engine comes in from its run there wouldn't be much live coals in it?

A. Sometimes and sometimes hardly any.

Q. How many engines a day would you handle on the cinder pit—on an average?

A. On an average about fifteen.

Q. There was a crew that did that work was there not?

A. Yes sir.

Q. When you say you did you mean during your shift?

A. Yes sir.

Q. What method did you have of putting out those coals or quenching them?

A. The pit men would throw water on them.

Q. How many men did you have employed in the pit?

A. It might be lots of engines would come in—there would be four; two daytimes and two nights.

Q. What do the pit men do there?

A. Wet down the cinders, clean out the pan and clean the cinders out of the pit.

Q. And whenever an engine is discharged from the cinder pit wouldn't the pit men wet down the cinders?

A. Sometimes wet them down right away and sometimes they wouldn't.

Q. Sometimes waited until the pile accumulated did they?

A. Sometimes they were busy at something else.

79 Q. When they did wet it down they would throw the water upon these live coals and cinders?

A. Yes, sir.

Q. That would cause a lot of steam to rise and blow over in there with the wind?

A. Yes.

Q. Didn't it make a noise also?

A. Sometimes, yes

Q. And that steam would be carried in which ever direction the wind was?

A. Yes, sir.

Q. And it would rise a large volume or small volume according to the area of cinders that were wet down?

A. Yes sir.

Q. Was it a usual thing to find a volume of steam hanging over that cinder pit and being blown by that wind?

A. There would be some blowing around.

Q. Some blow away and some stay there for a while according to the wind?

A. Yes sir.

Q. So that as a common thing there was the presence of some there?

A. Yes for awhile when the cinders were taken out.

Q. State to what extent you had occasion to pass up and down that track between the cinder pit and the round house and switches?

A. Walked up and down several times a day whenever the work would call us to go up and down there.

Q. Mr. Gray the same way?

A. Yes sir.

Q. Did you know about the existence of this little shanty on the road or the track?

A. Yes sir.

Q. What was that used for?

A. It was used for the dispatchers and helpers to go in and eat their lunch and sit down in there out of the weather when there wasn't any work.

Q. Were you in there at the time this engine was brought in by Mr. Kane soon after the accident?

A. Yes, I was in that shanty.

Q. While in that shanty was it part of your duty to listen for incoming engines?

A. Why, yes, but being there as long as I was something would call my attention; being at the work as long as I was there were times when my mind wouldn't be on what was around there.

Q. You became conscious of the fact that this engine had passed up north?

A. When brought into the yard, yes.

80 Q. Did Mr. Gray come into the shanty after he was struck or injured?

A. Yes, he came in afterward.

Q. How long before that had you heard this engine pass by?

A. Do you mean pass the shanty? I didn't hear the engine go past the shanty; I heard her come in the yard but not past the shanty.

Q. Did you hear any bell rung as this engine went by your shanty?

A. I didn't hear the bell on that engine.

Q. If the bell on that engine was ringing as it passed the shanty you would have heard it?

A. Not always.

Q. On this particular occasion do you know whether or not you would have heard it as it went past the shanty if it was ringing?

A. Not necessarily—I could have my mind on something else and the bell ringing.

Q. And at the same time you might have heard it?

A. Yes.

Q. But you didn't hear it?

A. No.

Q. It might ring and you not hear it?

A. Yes sir.

Q. As a matter of fact it was your duty to listen for the bell ringing?

A. Yes sir.

Q. Were you listening for a bell that might go north of the cinder pit?

A. In a way I was listening but it just slipped my mind.

Q. It was your duty to listen?

A. It was my duty, yes.

Q. That was one way in which the presence of an engine was indicated to you?

A. Yes sir.

Q. On hearing a bell it was your duty to come out and take care of the engine?

A. Yes sir.

Q. How far is this shanty, about, from the east rail?

A. I judge about 14 feet.

Q. Is it that far?

A. Yes, I judge it to be.

Q. When Mr. Gray came in there he was all covered with blood, wasn't he?

A. Yes, sir.

Q. He told you he was struck by an engine?

A. Yes sir.

Q. You were a little surprised because you had heard no engine go by and heard no bell?

A. Yes sir.

Q. Other times you did hear the bell ringing on engines as they went by and also had heard the engines?

A. Not always.

Q. You had heard them on other occasions?

A. Yes sir.

Q. Isn't it a fact, Mr. Rock, that you had nothing to do on this particular occasion but to listen for the approach of an engine, and isn't it true also that you were listening for the bell on any engine that might come in on your track?

A. Yes sir.

Q. Under those circumstances isn't it true you would have heard the bell if one were ringing?

A. No.

Q. I show you plaintiff's Exhibit "C" and ask you to look at it and state whether or not that is all in your own handwriting?

A. It is in my handwriting, yes.

Q. Do you know about when you wrote that—how long ago?

A. I don't know whether it is dated or not; I didn't notice that.

Q. It is dated Antigo, 5th of December, 1911 that date is evidently correct is it?

A. I don't remember if it was that date or not.

Q. You said in that, did you not, that if the bell had been ringing you surely would have heard it?

A. That is what is down there.

Q. Was that your opinion at that time?

A. I didn't base it on anything at that time.

Q. You did state in that didn't you or intended to that everything you set forth was the truth in reference to whether or not the

bell had been ringing and if it had been ringing you would have heard it?

A. I intended to put down what was the truth.

Q. And that time you said if the bell had been ringing you surely would have heard it. Was that your judgment then?

A. Yes, in a way.

Q. I don't understand what you mean by "in a way." What do you mean to modify by "in a way?"

A. I was in the shanty there and didn't hear it go by.

Q. Is it your judgment now that if the bell had been ringing as it went by that you would have heard it?

A. No, the bell could have been ringing and I not hear it.

82 Q. I grant you that; but the question is—Is it your judgment that if it had been ringing going by you would have heard it?

A. It could have been ringing and I might not hear it.

Q. You told me that a dozen times. What did you mean when you state in that writing "If the bell had been ringing I surely would have heard it?"

A. I had my mind based on the fact that the bell wasn't ringing.

Q. You had it in your mind when you made that written statement that the bell wasn't ringing?

A. Yes, that is why I made that statement.

Q. You had that in mind because you were in the shanty at the time listening for incoming engines?

A. Yes sir.

Q. And it was your duty to listen for incoming engines?

A. It was.

Q. And you can hear the bell of incoming engines when they are passing that shanty?

A. You can if you are listening.

Q. You can hear them further away than that?

A. Yes.

Q. If an engine went by two blocks away and they were ringing a bell you could hear it?

A. If you were good of hearing.

Q. Are you good of hearing?

A. Pretty fair.

Q. You don't claim your hearing is at all defective?

A. I haven't had it tested.

Q. How soon after this accident did you talk with counsel for the defendant about the bell ringing?

A. Do you mean with Mr. Gray?

Q. With Mr. Smart or Mr. Gorman?

A. I can't remember just how long it was; might have been a week or somewhere along that.

Q. How did you come to see them so soon after the accident?

A. One of the company men called me in the office I think a week after, may be longer. I can't say that for sure; I don't remember when.

Q. Who was it?

A. A claim agent, I forget his name.

Q. Mr. Pearsall—this man sitting over towards Mr. Smart—looks like a clergyman?

A. I think he is the gentleman.

Q. How soon did you talk with Mr. Smart or Mr. Gorman here about the ringing of the bell?

83 A. I don't remember of talking with any of them any time unless today.

Q. Did they ask you whether or not you heard the bell ringing?

A. I forget now.

Q. Do you mean to say you forget the talk you had with them today?

A. I forget other things.

Q. You hadn't talked with any of them at the time you made this written statement?

A. No.

Q. Do you know what you were doing before Mr. Gray came into the shanty?

A. Sitting in the shanty resting.

Q. What, if anything, occupied your hands?

A. Nothing.

Q. Just sitting still?

A. Yes.

Q. Was the door open?

A. The door was closed.

Q. Any windows in?

A. Yes, three windows.

Q. Any window in the west end?

A. Yes, there is a window in the door.

Q. Any window in the west end?

A. No, Just in the door.

Q. How long had you been in the shanty before Mr. Gray came in at the time you saw Mr. Gray when he was injured?

A. May be about two hours.

Q. Continuously for two hours?

A. About two hours.

Q. What time of day did Mr. Gray come in there injured?

A. After being injured?

— — —
A. I think about ten minutes.

Q. Did you make any note of it?

A. No.

Q. Had you been in the shanty doing nothing for those two hours prior to that time?

A. Yes.

Q. Continually? Hadn't come out at all?

A. Hadn't come out at all.

Q. Was there a window in the south side of that shanty?

A. Yes sir.

Q. A couple?

A. One.

Q. That was towards the cinder pit track?

A. Yes.

Q. You were looking out of that to see if an engine was coming in?

A. No sir.

Q. Were you in a position where you could look out of that window?

A. No sir, the windows are up a little high.

84 Q. Any windows in the north side?

A. No sir.

Q. They weren't smeared over?

A. No sir.

Q. Only one in the south end and one in the east end?

A. Yes.

Q. Did you notice how much vapor and steam and smoke there was rising from the cinder pit track at this time when Gray was hurt?

A. I noticed that there was quite a bit.

Q. Did you notice it before he was hurt?

A. I noticed it that morning; couldn't help but see it.

Q. Why do you say you couldn't help noticing it?

A. Knocking out the fire it was close to the cab.

Q. There had been a good deal of cinders knocked out and left undisturbed on the cinder pit that morning and the day before?

A. Yes sir.

Q. Did you hear Mr. Gray give directions to the pit men to turn water on the cinders that were hot and likely to burn somewhat?

A. He told me several times at different times.

Q. On this particular morning?

A. I don't remember.

Q. Did you see the man turn water on the cinders and coals on this particular morning?

A. When they were knocking fire out and I came to the gangway then they were putting water on.

Q. So you did, in fact, see them putting water on?

A. Yes sir.

Q. Didn't the steam and vapor and gas rising there make it difficult somewhat to do your work?

A. Sometimes.

Q. Didn't it that morning if there was quite a bit there?

A. Sometimes a person can stand more gas than others.

Q. Do you know whether the wind was blowing the steam north toward the coal shed and shanty?

A. It was blowing north I think. I don't know just which way the wind was blowing; the wind was blowing the steam and gas more north I think.

Q. Was the wind blowing quite a gale?

A. No, I don't think it was.

Q. Was it a brisk wind.

A. I couldn't say how fast it was blowing.

Q. Did that steam and vapor rise high from the pit so as to bother you when up on the seat of the engine.

A. Some times.

Q. How was it on this morning. How high did it rise
85 above the *the* cinder pit?

A. When the water was thrown on it would sometimes rise to the top of the cab.

Q. That would depend on the force of the water?

A. Yes sir.

Q. After you went into the shanty did you observe the condition of the vapor and smoke any further?

A. I didn't look out the window to see.

Q. Didn't look out to know anything about it?

A. No.

Q. Immediately after Mr. Gray came in hurt what did you do?

A. He asked me to get him a pail of water and I went and got it.

Q. When you got this pail of water there was still steam and smoke from the cinder pit and blowing north of it?

A. Yes, there was some blowing.

Q. And the wind was blowing north?

A. Yes.

Q. How far north did it extend?

A. I should judge about a car length, or a car and a half at times.

Q. I suppose you didn't measure it in any way?

A. No.

Q. Didn't pay any attention much?

A. No, not exactly.

Q. Was it pretty dense?

A. Some times.

Q. When you went out after this pail of water was it thick and heavy?

A. In places.

Q. In some places more dense than others?

A. Yes sir.

Q. As a matter of fact that vapor and steam and smoke was blown further on north of the shanty than it was when you went out?

A. No, that time it was blown a car or a car and a half.

Q. It had blown further north than the shanty when you went out?

A. Not that I know of.

Q. Will you swear that it hadn't.

A. I know it hadn't.

Q. Had it rose up above the ground a little ways?

A. Yes.

Q. It hadn't stopped at a certain point had it?

A. No.

Q. It kept on going until it was evaporated?

A. Yes sir.

Q. What did you do after you got the water?

A. Brought it to the shanty.

Q. What of the engine?

A. When I got back with the water I noticed the engine up at the wood pile north of the shanty.

86 Q. And that was Mr. Kane's engine?

A. Yes.

Q. 1066?

A. Yes sir.

Q. Did you go up to that engine immediately after getting the water for Mr. Gray?

A. Yes sir.

Q. Did you see Mr. Kane?

A. No sir.

Q. Did you see his fireman?

A. No sir.

Q. They had departed?

A. They had gone.

Q. About how far north of the shanty had the engine stopped?

A. I think it was around in here some place.

Blue Print, Defendant's Exhibit "One" indicates the point by an "x" at which the engine had stopped.

(Witness indicates by pointing finger towards a place marked "wood bin.")

Q. I notice along here on the east side of this track north of the cinder pit there is an obstruction is there not?

A. Yes sir.

Q. How high up is that box in which they discharge steam?

A. I should judge about four feet high.

Q. Comes closer to the east rail than what your shanty did?

A. Yes sir.

Q. Did you see within an hour or two, either Mr. Kane or Mr. Kruse, after the accident?

A. No sir.

Q. How soon did you get back to your shanty again after having gone up to where the engine was?

A. Why, it must have been an hour afterwards; after I had the engine taken care of I went back to the shanty.

Q. You didn't go back to where Mr. Gray was or take any care of him.

A. No, I couldn't stand to be around where there was any blood, that is the reason I didn't go back to help him.

Q. Was he bleeding profusely?

A. He was.

Q. Where was he bleeding from?

A. He was covered with blood all over his face. I just took a glance at him, that is all.

Q. When you came back Mr. Gray was gone?

A. When I came back from the engine.

87 Q. When you came back from tending the engine?

A. He was in the shanty then.

Q. When you remember him bleeding?

A. Why, I went and got the engine and put it back on the pit and after I got back to the shanty he was ready to go home.

Q. He was still in the shanty after you had done all that?

A. No. After I gave him the pail of water I went and run the engine down to the pit and opened the pan and while I opened the pan and was getting the cinders out of it he was on his way home then.

Q. Then I am right in saying when you came back after doing this Mr. Gray was no longer in the shanty?

A. No.

Q. How long had you worked there in this capacity, with Mr. Gray?

A. Between six and seven years.

Q. Did you know about this bulletin which had been put up there that winter which gave instructions for engines to stop south of the cinder pit?

A. I didn't know of no bulletin.

Q. You knew that the engines did frequently stop south of the cinder pit?

A. Some times.

Q. Some stop south and sometimes some go north?

A. Yes.

Q. The greater number of them that winter and a short time before Mr. Gray was hurt stopped south of the cinder pit?

A. No, they were running along most any place.

Q. Was there a place for damaged engines north of the cinder pit?

A. I don't know of any.

Q. Wasn't it part of your duty to look after the bulletins that are stuck up there and see what they provided?

A. I suppose in a way.

Q. Didn't you make it a habit daily to read bulletins?

A. No.

Q. How frequently did you read bulletins?

A. Couldn't say about that. I couldn't say how often it would be.

Q. Can you tell us when was the last time you looked at the bulletin board just before Mr. Gray was hurt?

A. I looked at the bulletin board most every day. I went into the round house to see what was the number; but I didn't
88 look at the bulletins that was posted up there in writing or paper.

Q. You looked at the bulletin board every time you went in the round house?

A. Yes sir.

Q. Was that every day?

A. Yes.

Q. Then you would read the bulletins there daily?

A. No. I wouldn't read the bulletins. The bulletin was on one side; there is part of one side that has the bulletin on written on paper or printed, and the bulletin board is on the other for the

purpose of marking the train and engine and name of the engineer and fireman and what time they are going to leave.

Q. Was that marked in chalk on a blackboard?

A. Yes.

Q. And also the bulletins written on paper posted on one side of the board?

A. Yes.

Q. Did you examine those?

A. No.

Q. Did you never examine those?

A. Once in a while, not often.

Q. Wasn't it part of your duty to examine those to see what your duties were and get directions for duties on the tracks?

A. It might have been but I didn't.

Q. Will you tell us whether or not there was a bulletin directing that engines will stop south of the cinder pit?

A. I don't remember.

Q. But engines were stopped south of the cinder pit?

A. There was some did.

Q. That was before Mr. Gray got hurt?

A. Yes.

Q. The fact is that many of the engines did stop south of the cinder pit that winter?

A. Oh, yes, there were some.

Q. You passed up and down that space frequently between the west rail and the coal shed?

A. Not very often.

Q. Where did you generally pass up and down between the two rails?

A. Sometimes; sometimes outside of the east rail.

Q. There was a space there of three feet between the rail and the north?

A. Not so close to the track.

89 Q. Are there more obstructions on the east side than on the west side?

A. Yes sir.

Q. Any obstructions on the west side?

A. Yes, the coal shed.

Q. There was a space there of three feet between the rail and the coal shed?

A. I don't know; I never measured it at all.

Q. Have you been asked by counsel in the case where you usually walked when you passed up and down there?

A. I don't know what you mean.

Q. Have you been posted by Mr. Smart or Mr. Gorman today or any other time where to say you walked when you passed up and down the track?

A. I don't remember.

Q. Can you remember anything they asked you?

A. Well, may be, a few things.

Q. Did they ask you about where you walked?

A. I said I don't remember.

Q. Didn't they suggest to you the idea that you always walked on the right side?

A. No, they never told me I always did.

Q. They didn't tell you that?

A. No.

Q. Can you tell us whether they asked you about where you walked or not?

A. I don't remember.

Q. You can tell us whether they asked you whether the bell was ringing or not?

A. I think they asked me about that.

Q. But when I asked you that question some 15 or 20 minutes ago you said you didn't know about it. Do you now remember that they did ask you about the ringing of the bell?

A. I don't think you asked me that. If you did I think it is queer I didn't answer it. I don't think you asked me at all.

Q. Do you know now as to whether or not Mr. Smart or Mr. Gorman asked you about the ringing of the bell on that engine?

A. They never asked any other time.

Q. My question is did they today, or any other time, ask you about the ringing of the bell?

A. I think they asked me today.

Q. You know they did, don't you?

A. I'm pretty sure they did.

90 Q. And that is where you got the idea that you are not sure that you heard the bell ringing, if it did ring in fact?

A. Oh, no, I had it before.

Q. Discussed that question with them? Doesn't that account with your testimony not jibing with your written statement?

A. No sir.

Q. There was nothing along in this place between the west rail and coal shed to prevent your walking along there if you saw fit so to do?

A. In the winter time there would be snow in there.

Q. But beaten down just the same as between the rails?

A. That is on the inside.

Q. I want to know was it beaten down the same as between the rails?

A. Yes sir.

Q. And to and from work to your coal shed?

A. I say that the sheeting is on the inside of the studding.

Q. I call your attention to photograph marked "Defendant's Exhibit 3" which purports to show the coal shed?

A. Yes sir.

Q. Do you see the construction of that coal shed?

A. Yes sir.

Q. There is a wide space here I judge a foot wide?

A. I think so.

Q. And the sheeting is on the inside of the studding?

A. Yes sir.

Q. There is plenty of space in there for a man to walk even when an engine is passing?

A. I wouldn't care to be walking in there.

Q. You had rather be walking between the rails?

A. No, on the other side.

Q. And you got that idea from Mr. Smart and Mr. Gorman?

A. No sir.

Q. Would you prefer being in between the end of this steam box and the east rail when an engine was passing? The blow-out box?

A. There is space there—

Q. Answer my question? Would you prefer to be in there then in between the north rail and coal shed?

A. Yes.

Q. Why?

A. More space.

Q. Which is closer to the rail—the east end of the blow off box of the sheeting or the coal shed?

A. I don't know; I never measured; there can't be much difference.

91 Q. Why do you say more space if you never measured it?

A. Because I have been there.

Q. Will you admit the truth that you are now trying to help the defendant in your testimony. You are now trying to testify as Mr. Smart would like you to as near as you know how?

A. I am trying to tell the truth.

The defendant objects to the attorney asking such questions and making such remarks to the witness, and takes exception at this time to counsel stating that the witness is trying to testify as Mr. Smart wishes.

Q. Why do you say that you had rather be in between the west end of the blow off box and the east rail rather than up between the coal shed and the west rail if you didn't know whether the blow off box is closer to the east rail than the coal shed is to the west rail?

A. I don't know how to answer that.

Q. And that means you don't know which is closer to the shed?

A. I never measured.

Q. But from your observations is the blow off box closer to the east rail than the coal shed is to the west rail?

A. I judge it to be a little closer.

Q. Some excavation between the shanty and the cinder pit on the east side of the track up close to the rail?

A. I don't know what you mean.

Q. I mean a dig out between the shanty and the cinder pit on the right hand side of the track?

A. Yes, there is.

Q. How close is that to the end of the ties?

A. I don't know what you mean.

Q. Isn't there a dug out there further on the north end of that as shown by this blue print (blue print shown witness) Plaintiff's

Exhibit "1" right near the cinder pit where that track is depressed, that track and the east rail?

A. There is a foundation.

Q. How much of a dug out is there there?

A. About 24 inches.

Q. Down below the surface of the main track?

A. Yes.

Q. How near does that dug out come to the east rail of the main track, suppose I say the dug out is down here, How close does this wall of the dug out come to the main track—the east rail of it.

A. I should judge about three feet any way.

Q. Have you ever measured it?

A. No.

Q. At most it is not more than three feet?

A. Well, it is close one way or the other.

Q. How far out does that dug out extend from the north side of the cinder pit? How far north does it go towards the shanty?

A. About six or eight feet.

Q. It projects up towards the shanty six or eight feet?

A. Yes.

Q. And just beyond that is the end of the blow off box, that is, the blow off box is right north of the dug out?

A. Yes.

Q. Who were the men that you saw at work that morning there throwing water on the cinders on the pit?

A. There was only one man, Tony Kriuscki.

Q. What time did you see him throwing water on the cinders?

A. We were taking care of the engine, cleaning the fire and knocking it out.

Q. That doesn't tell me what time it was?

A. Between six o'clock and eight o'clock in the morning.

Q. Did he continue from six until eight o'clock?

A. No sir.

Q. Can you fix it any more definitely—whether he would be putting water on five minutes on ten minutes?

A. Five or ten minutes at a time; it all depends on how long it would take to get the fire out.

Q. You mean to say that between the hours of six to eight, from time to time you saw this man put water on?

A. Well, we had engines all the time. I didn't notice it any other time.

Q. You say you were in the shanty two hours before the accident happened so you went to the shanty shortly before the eight o'clock?

A. Yes sir.

Q. So after that you didn't see what this man did?

A. No sir.

Q. When you went back to get the water did you help yourself to the water?

A. Yes sir.

Q. Did you see this man?

A. No sir.

Q. And you got the water from this hose that was used to throw the water on the cinders, did you?

A. Yes sir.

Q. How many engines did you handle on the cinder pit track that morning before the accident?

A. Four I think is all that I can remember.

Q. That doesn't include Kane's engine of course?

A. No sir.

Q. Do you know where these engines came from and who the crews were?

A. I know where the engines came from; I don't know the name of the crew though.

Q. Where did the fourth engine come from?

A. Rhinelander.

Q. What was the number of that engine?

A. I don't remember.

Q. Where did the third engine come from?

A. That was one of the switch engines.

Q. And the second?

A. That was one of the switch engines.

Q. And the first?

A. That was an engine come from Ashland.

Q. Did you work on those four?

A. Yes sir.

Q. And Mr. Gray also on all four?

A. Yes sir.

Q. About how long does it take to handle an engine from the time you take it and put it on the cinder pit until you let go of it with your work completed?

A. Some engines take ten minutes, some 15, 20, 25, all depends on the fire.

Q. What was that fourth engine's train number?

A. 114.

Q. Train No. 114 was the Rhinelander train?

A. Yes sir.

Q. Was that a passenger?

A. Yes sir.

Q. Did you see any railroad men about when you first went down to the shanty immediately after Gray came in bleeding and hurt, after you came out of the shanty?

A. After I came out of the shanty? No, I didn't see any railroad men then.

Q. You talked with none?

A. No sir.

Q. Where was the foreman of the roundhouse?

A. I suppose he was at the round house some place.

Q. You didn't go and notify him of the fact that Gray was hurt?

94 A. I did not. I didn't know how bad he was hurt.

Q. The fact is you didn't talk to any railroad man about his being hurt?

A. No sir.

Q. You didn't see any railroad man about him at any time while he was in the shanty after being hurt?

A. No.

Q. Did you see anybody with him after he left the shanty?

A. Yes.

Q. Who?

A. Tony Beranzky.

Q. Is that a pit man?

A. No fireman.

Q. Where did you see he and Gray together? At what point?

A. Just a little ways north of the cinder pit.

Q. Going with Gray to Gray's home was he?

A. They were both standing still when I saw them.

ANTHONY J. BERANZYK, called as an adverse witness, being first duly sworn, testified for and on behalf of the plaintiff, as follows:

Cross-examined by Att'y P. H. MARTIN:

Q. Where do you live?

A. Antigo.

Q. Were you in the employ of the defendant company on the 19th day of January, 1911, when Mr. Gray was hurt?

A. Yes sir.

Q. In what capacity?

A. Fireman.

Q. Did you see Mr. Gray before he was taken home after being hurt?

A. I saw him by the coal shed standing there.

Q. Was he hurt at the time you saw him?

A. Yes.

Q. About what time of the day was it?

A. Along ten o'clock in the morning.

Q. Do you know how long before that he was hurt?

A. No sir.

Q. Did you see this engine 1066 that Mr. Kane was engineer on that morning?

A. Seen her standing on the cinder pit.

Q. Was it standing on the cinder pit when you saw Mr. Gray?

A. Yes.

95 Q. Was it being cleaned at that time?

A. I don't know.

Q. What was Mr. Gray doing when you first saw him?

A. Standing wiping blood off his face.

Q. Did you go up to see how bad he was hurt?

A. He was bad.

Q. Had he been to the shanty after being hurt?

A. I don't know.

Q. Did you go to him?

A. I walked to him; I was about ten feet; I asked him what was the matter; he said an engine hit him.

Q. Did you go home with him?

A. No sir, I took him by the arm and I said go to the doctor and he said, "No, I want to go home, I want my own doctor." I said "Can you make it home yourself?" He said "Yes." I said "I am going up and notify the foreman to telephone Dr. Donohue to go up to your house."

Q. And you did, did you?

A. Yes.

Q. Where did you come from?

A. From the round house.

Q. You didn't see Kane's engine coming in?

A. No sir.

Q. Didn't know it was in?

A. No sir.

Q. Didn't notice the condition back there of this vapor and smoke at the time it came in?

A. No sir.

Q. Did you observe whether or not there was still some vapor and smoke rising from the cinder pit at the time you saw Mr. Gray?

A. No sir.

Q. Do you know whether there was any?

A. I couldn't say.

Q. Did you notice the wounds that Mr. Gray had on his head and face—the injuries?

A. Yes sir.

Q. What did you notice with reference to any injuries he had?

A. Well, he had on the forehead and his face.

Q. How about the wound on his forehead; what did you notice with reference to that?

A. The skin was hanging over on his eyes.

Q. How large a flap?

A. I couldn't say.

Q. Did you see him at his house after that?

A. About two or three days after.

Q. Did you go down the track from the round house on the lead track—on the out-going track?

A. Yes sir.

96 Q. You know about men working in there between the cinder pit, on the cinder pit between there and the round house, do you?

A. No sir, I don't.

Q. You know Mr. Gray worked there and had a helper a couple of men—one at least?

A. Yes sir.

Q. You don't know anything about how this accident happened?

A. No.

CHARLES MOHLE, called as an adverse witness, being first duly sworn, testified for and on behalf of the plaintiff, as follows:

Examined by Att'y P. H. MARTIN:

Q. You live at Antigo?

A. Yes sir.

Q. On the 19th of January, 1911, were you in the employ of the defendant company as foreman of the round house at Antigo?

A. Yes sir.

Q. Did you see any of this accident to Mr. Gray?

A. No sir.

Q. How long after it happened before you learned of it?

A. Why, it must have been 20 or 25 minutes I think.

Q. You have no personal knowledge of how it happened, then?

A. No.

Q. Did you see Kane's engine come in?

A. No sir.

Q. When did you first know it was in?

A. When I saw the engineer and fireman in the roundhouse registering.

Q. Your work kept you that morning in the round house?

A. Yes sir.

Q. So you know nothing about the conditions outside so far as they relate to this accident?

A. No, nothing I am occasionally called out doors at times.

Q. This morning of the accident I mean?

A. No sir.

Q. Do you know anything of this bulletin that has been mentioned?

A. No, I can't recollect it.

Q. Did you have any duty or was it your duty to know what was contained in that bulletin?

A. Yes sir.

Q. Now, I do not refer to what was written in chalk on the black-board but what was posted up in pen or pencil.

A. Yes.

97 Q. The engineer testified to having knowledge of a certain bulletin that was put up there that winter, do you know anything about that?

A. The only recollection I have of the bulletin was a matter of icing up of the wrecker track switch.

Q. You refer to a bulletin that you saw that meant that?

A. Yes, that was the meaning of it; I can't remember it exactly.

Q. In that same bulletin did it not say that engines should stop south of the cinder pit?

A. I can't remember.

Q. It might have contained it?

A. It might have, yes.

Q. Do you know what happened to that bulletin?

A. No, I can't say.

Q. Don't you preserve those bulletins?

A. We do, yes.

Q. What, in the ordinary course of business, would become of that bulletin?

A. It would be preserved on file.

Q. And you are pretty careful to preserve all these?

A. Yes, we try to.

Q. Whose duty is it to put it on file?

A. The clerk would file it.

Q. In the usual course of your business would it remain on the bulletin board a definite length of time?

A. Yes.

Q. Then put it on file? A. Is that the way you do?

A. Yes sir.

Q. Take this particular one: How long would it remain on the bulletin board before it would be placed on file?

A. Sometimes they remain longer than others. Long enough for the men to become acquainted with them.

Q. You would leave it long enough for all the men to have knowledge of its contents?

A. Yes sir.

Q. And when all the men were supposed to know the requirements of the bulletin you would take it and file it away?

A. Yes sir.

Q. Do you know by whom this bulletin was signed?

A. I cannot recollect but I suppose by Mr. Armstrong.

Q. He had authority to issue such a bulletin?

A. Yes sir.

Q. Have you made any examination of the files to ascertain whether or not this bulletin was among them?

A. Yes sir.

Q. And you didn't find it?

A. I didn't.

98 Q. When did you make the first examination for that purpose?

A. Looked in the files at the time Mr. Gray was hurt.

Q. At the time?

A. Shortly after.

Q. About how soon?

A. I can't remember.

Q. How did you happen to do that?

A. To see if there was anything specifying that.

Q. What?

A. The movements of engines over the cinder pit.

Q. Mr. Smart suggests that you thought he had written in reference to the examination of the files, and that he did, at that time, send up for information to draw his answer?

A. We looked then, yes.

Q. But you did look before?

A. Yes, we did look before, that is, I did in the files in the office.

Q. And the bulletin isn't to be found?

A. No sir.

Q. Did you, under the instruction of some one, look for that bulletin in the first instance?

A. No sir.

Q. Was it at your own volition you made the search?

A. Yes, I think it was.

Q. No one suggested it to you?

A. No, I just casually looked it over.

Q. You had something in your mind that it did state something about where the engines were to stop?

A. That is the only recollection I had.

Q. Wasn't it your recollection that that bulletin said the engines should stop south of the cinder pit?

A. No sir.

Q. You cannot deny whether it did or not?

A. I don't think it did; the only recollection I have I remember that the matter was brought up about standing on the wrecking train switch relative to ice at that point.

Q. The wrecking track switch wasn't very far north of the cinder pit was it?

A. Might have been three or four car lengths, probably five.

Q. Comparatively a short distance. About how many feet—100?

A. 100 to 150 feet; I couldn't say exactly.

Q. Approximately that?

A. Yes sir.

99

WEDNESDAY MORNING.

WILLIAM H. GRAY, being first duly sworn, testified for and on behalf of the plaintiff, as follows:

Direct examination of Mr. Gray by Att'y P. H. MARTIN:

Q. Mr. Gray you are the plaintiff in this case?

A. Yes sir.

Q. How old are you?

A. 51 years old.

Q. Where do you live?

A. Kaukauna, Wisconsin.

Q. Where did you spend your earlier days?

A. Manitowoc county.

Q. Where?

A. Meeme.

Q. On a farm?

A. Yes sir.

Q. Were you in the employ of the defendant company on the 19th of January, 1911?

A. Yes sir.

Q. In what capacity?

A. Engine dispatcher.

Q. How long had you been in its employ in any capacity?

A. 29 years.

Q. In what different capacities had you worked for the defendant company for those 29 years?

A. Dispatching, wiping, firing, running an engine.

Q. Had you been an engineer pulling engines on the road?

A. Yes sir.

Q. For how many years?

A. Between ten and eleven.

Q. How long had you been dispatching.

A. About 14 or 15 years.

Q. What had been the condition of your health at all times?

A. Fairly well.

Q. Able to do all kinds of hard work?

A. Yes sir.

Q. How long had you stayed on a farm?

A. Until about 17.

Q. Until you were about 17 years of age?

A. Yes sir.

Q. Were you able to do different kinds of farm work that a boy of that age would be?

A. Yes sir.

Q. On the 19th of January, 1911, were you on duty?

A. Yes sir.

Q. What time in the morning did you go to work?

A. Six o'clock.

Q. How many engines did you take care of prior to the time you met with your accident?

A. I took care of three engines to my knowledge.

100 Q. What did you do with them?

A. Run them on the pit, knocked the fire out, took them to the coal shed and had coal put on, and to the water tank to get water and to the wood pile for wood, and from there to the turn table and to the house.

Q. Did you sand them also?

A. No, sir.

Q. Did you have a helper in doing this work?

A. Yes sir.

Q. Who was it?

A. William Rock.

Q. How many men worked around the cinder pit and up the space between the cinder pit and the round house and yard in the city of Antigo?

A. Two clinker pit men and I think three coal shed men and myself and helper.

Q. Was there a number of men working in the round house as well?

A. Yes sir.

Q. State how generally the men used the track and premises between the cinder pit and the round house in passing to and from their work and in doing their work?

A. Well, myself and helper used that track almost continually while we were working; the coal shed men could use it walking

back and forth, they get in the coal shed from that side, and the clinker pit men would use it from the pit to the sand house very often.

Q. How about the engineers and fireman in coming in and going out?

A. I have seen them walk up and down there.

Q. So it was used daily?

A. Sometimes it was.

Q. I mean used by yourself, the clinker pit men and the coal shed men?

A. Yes sir.

Q. Are these premises wholly within the city limits of Antigo?

A. Yes sir.

Q. About what time of the day did you sustain your injury?

A. I should judge it was a little before ten when the engine struck me.

Q. Where had you been just before?

A. Just before that I had been to the engine house.

Q. Do you mean the round house when you say the engine house?

A. Yes.

Q. What was the condition of things at the cinderpit that morning?

101 A. The cinder pit was full of cinders almost; at places it was filled, at other places a little lower, and so on through the pit.

Q. What was the condition with reference to whether or not there were live cinders in it?

A. Yes, there was fire in them.

Q. Go right on and tell the condition of the fire and all about it.

A. It threw up smoke and gas and steam, a certain amount of steam, made it very disagreeable to work there.

Q. That was true on that morning?

A. Yes sir.

Q. Did you give any directions with reference to quenching the cinders?

A. Yes sir.

Q. What did you say?

A. Told the cinder pit man to put the hose on there and put the fire out, that the stringers would get hot and some big engine would be liable to come along and get into that pit.

Q. Did he do so?

A. Yes sir.

Q. What did you have this hose there for?

A. To wet the cinders down.

Q. Was that a condition that prevailed frequently?

A. Yes sir.

Q. Live cinders on the pit that you had to wet down?

A. Yes, that is generally there is live coals in the engine in the fire box, and you will get an engine once in a while that the fire will be practically out in the fire box.

Q. In other words, whatever fire is in an engine at the end of a trip is knocked out on the cinder pit?

A. Yes sir.

Q. You said you had been at the round house and came down to this cinder pit. What did you go there for?

A. I went to the sand house and I went down to see if those men were putting the fire out properly.

Q. How did you go down? On what side of the track?

A. I went down what is known as the coming in track to us; I started to take that track between the rails up to the north end of the sand house.

Q. What track?

A. The track next to the coal shed.

Q. Is that the track on which the engine came that hit you?

A. Yes.

Q. Go on?

A. And I took between the track and the sandhouse to the shanty and from the shanty I crossed over from about the blow-out box and the corner of the shed.

102 Q. That is, you crossed the west side of the track?

A. I crossed to the west side of the track.

Q. How close did you come to the cinder pi-?

A. When I crossed over I was probably three or four feet from the end of the cinder pit; When I was crossing over between the shed and the cinder pit.

Q. What did you find the condition to be there then?

A. I found the man standing there with his back towards the shed or a little towards the south with the hose in his hands putting the fire out. I looked at him for a short while and started back to the shanty.

Q. As you were going back to the shanty tell us about the volume of steam and smoke and vapor if there was any rising from the cinder pit at that time?

A. There was quite a lot.

Q. Give us some better description of the volume. How extensive was it? How much did it obscure the view, etc.?

A. It obscured the view; the steam was about as high, in my judgment, as the lower part of the shed; very thick and drifting north.

Q. What was the occasion for its drifting north?

A. The wind.

Q. Which side of the building was it being carried to? I speak of the coal shed?

A. It was passing me along the east side of the coal shed.

Q. Before you started back did you see or hear any engine approaching?

A. No sir.

Q. Did you listen?

A. Yes sir.

Q. Then when you started back what route did you take?

A. I took the route between the coal shed and the west rail.

Q. Was that the usual way?

A. Yes, I have walked there thousands of times.

Q. As you walked back state whether or not you were enveloped in this vapor and steam and smoke?

A. I was completely enveloped.

Q. Couldn't see your way?

A. No sir.

Q. Where were you going?

A. I was going to the shanty.

Q. What for?

A. To stay there until there was work for me.

Q. That would be until an engine came in?

A. Yes sir.

103 Q. How did you gauge your way?

A. I gauged my way along the coal shed. Along the stringers of the coal shed—I guided my way with those.

Q. How did you know where the shanty was?

A. I had to guess at it.

Q. Go on and tell what happened and how it happened and what you did.

A. I got down about, in my judgment, in front of the shanty, and the steam was so thick that I couldn't see my hand in front of me, and I stopped and listened for an engine and I couldn't hear any. I could hear a noise that water would make on hot cinders by pouring water on.

Q. What sort of a noise did it make?

A. My explanation of that would be, I guess everybody most has done it, it would be similar something to throwing a can of water or a pail of water on a pile of hot fire. It would make about that noise.

Q. Go ahead and tell us what you did?

A. I listened and couldn't hear nothing and I made up my mind that everything was clear and I raised my leg to make a step across the track and I got hit.

Q. Got hit by what?

A. That engine.

Q. Kane's engine?

A. Yes sir, well, that is, I didn't know at the time whose engine it was or who was running it.

Q. What happened to you?

A. I got hit in the face and I fell against the shed with my shoulder and the back of my head and I fell to the ground.

Q. Was it the first stroke of the engine that threw you against the shed?

A. Yes sir.

Q. And when you fell to the ground what happened?

A. I rolled over this way (indicating how) back towards the shed to get my legs and arms out of the way of the wheels and something. I should judge that it was one of the big oil hose of the tank that caught me in the back about a little above my ribs and about my hips and it rolled me.

Q. How far?

A. That I couldn't tell it was done so quick.

Q. What have you to say about the violence of the blow—the first blow you got which threw you against the coal house?

A. It was very hard.

104 Q. The coal house seems to be constructed by sheeting and studding on the inside. What was the object you struck—was it the edge of one of these studdings or were you thrown towards them?

A. I think it was the edge of the studding.

Q. What part of your body was struck?

A. My head and shoulder.

Q. Did your head also strike the studding?

A. Yes sir.

Q. What part of your head and shoulder was struck?

A. The back of my head across the scalp.

Q. There was a scalp wound?

A. Yes sir.

Q. Which shoulder?

A. This one (left).

Q. Where on the shoulder?

A. The left shoulder was black and blue here just between the elbow and up to the shoulder to the top of the shoulder also.

Q. Was that bruised?

A. Yes sir.

Q. After the engine passed what did you do?

A. I got up. I lost my hat; I crept around and I happened to find my hat and I felt my way around through the steam and went to the shanty.

Q. If you will, at this point, go on and tell us what wounds and bruises you had on your head and body and where they were. Take first the head—to what extent was that cut or wounded?

A. My temple was cut here. (You draw your finger on a line directly over the left eye.)

Q. Is that what you call your forehead?

A. My forehead, yes.

Q. To what extent was that cut?

A. It was cut so this flesh hung down and my skull was exposed.

Q. There is a black mark now leading from your ear down to the front of the forehead to your right eyebrow. Is that a mark you received that time?

A. Yes sir.

Q. There were also other slight marks or injuries that you received that time?

A. Yes sir.

Q. How much of the skin on the forehead flapped down?

A. It must be over two inches I guess. The marks are there I guess.

Q. How wide was the piece?

A. It is probably two inches or more.

105 Q. Just step down into the light so the jurors can see these marks that are on your forehead and I will describe them so we can have them in the records,

Here is a black and blue mark extending up and down about two inches along on the right side of the forehead; that seems to be connected with a mark leading across to the middle of the forehead connected with a black and blue mark leading down through the middle of the forehead to the inner edge of the right eyebrow, and connected with this a latter wound or mark is a black and blue mark leading from the top of the forehead diagonally across the top of the forehead towards the inner edge of the left eyebrow.

Q. State whether these marks and wounds were occasioned by the injuries you received that time?

A. They were.

Q. And the flesh and skin on the forehead between those marks is the flap that hung down?

A. Yes sir.

Q. On the left cheek leading from the edge of the lip and out about to the middle of the cheek and under the left cheek bone is a black and blue mark. State whether or not that was received at that time.

A. Yes, it was.

Q. Was there any other mark on your face?

A. Yes, under my chin and the top of my nose was split.

Q. How about this black mark on the top of your nose is that where the spectacles cross?

A. Yes sir.

Q. Point out where on the back of your head was this scalp wound?

A. Just about at the crown.

Q. How far did it extend?

A. Across here.

— The distance that you draw your finger across the crown of your head is a distance of about three inches?

A. Something like that.

Q. What bruises were on your body?

A. Well, there was quite a few bruises on my body.

Q. You have already mentioned bruises on your left shoulder and arm. To what extent were there bruises on the top of the left shoulder?

A. The bone of the shoulder was black and blue.

106 Q. How much of the surface did that cover?

A. Two or three inches.

Q. Take it up and down from the point of the shoulder towards the neck, how long that way?

A. About three inches.

Q. How wide was it across? How wide across the shoulder and how far back would it go down the shoulder, if at all?

A. It was probably two inches or two and a half inches wide.

Q. To what extent did that bother you?

A. It was sore.

Q. Was the skin broken?

A. No.

Q. How about your arm?

A. The arm was black and blue up near the shoulder joint.

Q. On the outside?

A. Yes sir.

Q. How far down from the shoulder joint was it?

A. It started about an inch from the shoulder joint and went down about three inches.

Q. How much of the arm did it cover in circumference?

A. May be two inches.

Q. What was the nature of the wound? Was the skin bruised or broken?

A. No sir, it was black and blue but not broken.

Q. Where else on your body did you have bruises?

A. I had a bruise on my left thigh.

Q. On the inside?

A. On the outside.

Q. From beginning where? Point out on your thigh.

A. Right about here. A. Just below the hip.

Q. And following down to what point?

A. A little above the knee.

Q. That would be about how many inches long there?

A. About six inches.

Q. How wide was that across?

A. It was about three to three and a half inches.

Q. Was the skin broken there?

A. It was kind of scraped.

Q. That is, rough?

A. Yes sir.

Q. Was it so rough as to bring the blood to the surface?

A. Yes, slightly.

Q. Where else did you have bruises?

A. I had bruises on my back.

Q. Did you see those?

A. No sir.

Q. Learned that from the doctor?

A. Yes, and my wife.

107 Q. Any place else?

A. There were slight bruises on my body that I couldn't describe just where they were.

Q. There were quite a few bruises which you sustained in this injury when you got hurt?

A. Yes sir.

Q. How soon did you go home?

A. I went to the shanty and tried to wash my face. I didn't realize at the time that I was injured that I was so bad. I asked Mr. Rock to get me a pail of water and I started to wash and in washing I felt this flap hanging down here.

Q. Felt like a veil hanging over your eyes?

A. Yes sir.

Q. Go on.

A. I went to the glass and I looked in the glass and I could see the skull so that scared me and I started for home.

Q. What happened when you got home?

A. I lay down on the lounge.

Q. Did you faint?

A. I think I got weak; I think there was for a little while I was pretty faint.

Q. How soon did the doctor come?

A. Just a short while after I got on the lounge.

Q. Who came?

A. Dr. E. J. Donohue.

Q. Who treated you during your illness?

A. Doctors E. J. and M. J. Donohue.

Q. Before you go into the question of your doctoring and how long, I will ask you about this so-called bulletin that has been referred to, what do you know about that?

A. I know it was in existence.

Q. Did you read it?

A. Yes sir.

Q. What did it provide for in reference to engines stopping and where they were to stop?

A. It provided for stopping south of the pit.

Q. Of the cinder pit?

A. Yes sir.

Q. What was the fact as to whether or not, after this bulletin was put up engines did stop south of the cinder pit?

A. Yes, they did.

Q. Did all of them stop south of the pit?

A. No.

Q. Can you give us the bulletin wording of it. Are you able to give us in substance the way that bulletin read?

A. It read to my knowledge for engines to stop south of 108 the cinder pit.

Q. Did you see anything else? Did it have any reference to ice on the switch connecting this wrecking track with the track that the engines were moved on to the round house?

A. Not to my knowledge.

Q. Who signed that bulletin?

A. Mr. Armstrong, if I remember right.

Q. He is the division superintendent or assistant superintendent?

A. Yes sir.

Q. Was there any occasion whatsoever for running engines north of the cinder pit?

A. Not to my knowledge.

Q. In caring for this engine state whether or not you would have to back it up on to the cinder pit?

A. Yes sir.

Q. Was that bulletin which you speak of put on the regular bulletin board for the purpose of inspection by the employees?

A. Yes sir.

Q. Do you know how long it remained there?

A. No, sir, I don't.

Q. Was it part of your duty to inspect that bulletin and know what the bulletins contained?

A. It was for my own benefit; that was my practice; I was in railroad service; of course the road men are supposed to—everybody is supposed to look at the bulletins.

Q. You are supposed to know what is on that bulletin board?

A. Yes.

Q. Did you have any ribs broken at the time you were struck?

A. Yes.

Q. What ribs did you have broken—on which side?

A. I don't know.

Q. Did you have ribs broken on both sides?

A. I don't know as to that.

Q. Why don't you know?

A. I had two broken in the back and I think I had one broken in front.

Q. Your doctor will know about that I suppose?

A. Yes, I suppose.

Q. As that engine which struck you approached over the cinder pit and beyond to the point where it struck you, state whether or not any bell was ringing on the engine?

A. No sir.

Q. Would it be possible for a bell to be ringing and you not hear it?

A. No sir, not under those circumstances.

Q. Did you look and listen for a warning before crossing
109 or attempting to cross?

A. Yes sir.

Q. How is your hearing?

A. All right.

Q. Were you able to form, or did you form an opinion or judgment as to the rate of speed that engine was going when it struck you?

A. Yes.

Q. What, in your judgment was the rate of speed of that engine at the time it struck you?

Objected to as incompetent as it was impossible for the witness to tell.

Objection overruled. Exception.

A. Between 10 and 12 miles an hour I should judge.

Q. What did you judge that from?

A. At the rate it struck me.

Q. You mean the violence of the blow?

A. Yes sir, and the time it took to go by me.

Q. You were quite familiar with the length of an engine of that kind and the tender, I suppose?

A. Yes sir.

Q. How long were you confined to the house with these injuries after the accident?

A. I think about two weeks.

Q. Did you have or suffer any pain?

A. Yes sir.

Q. How long, if at all, did you continue to be disabled from the performance of manual labor?

A. Ever since I got hurt.

Q. You may state whether or not you continue to suffer from injuries at the present time?

A. I do and my shoulder aches continually.

Q. You mean your left shoulder?

A. Yes sir, I cannot lie on it in bed. If I happen to roll on it when I am asleep in a short while it will wake me up with pain. It pains if I lie on it any length of time.

Q. Where is the pain?

A. From the bone of my shoulder down about four or five inches towards my elbow.

Q. Go ahead and tell us what further ills you suffer?

A. These muscles here pain me.

Q. The muscles just in front on the extension of the arm—the left arm?

A. Yes sir.

Q. What else?

A. And my fingers on the left hand at times get numb, especially if I get a little bit cold.

Q. How about the movement of the left arm?

A. I can't move it certain ways.

Q. Can you throw up your left arm at right angles with your body this way (indicating)?

A. No sir.

Q. Move your arm in that motion as high as you can out directly and up.

(Witness moves arm as directed.)

Q. Can you lift it any higher than that?

A. No sir.

Q. You practically can do nothing more than lift it about five inches up from your side?

A. No sir.

Q. Can you swing it out—swinging the whole arm around?

A. No sir.

Q. How about this rotary motion. Can you turn it so the palm of your hand will turn clear out?

A. No sir.

Q. Is that all the motion you've got in your left arm?

A. No sir.

Q. Was that the fact with reference to its condition before the accident?

A. No sir.

Q. Was the rotary motion of the arm limited in any way before the accident?

A. No sir.

Q. Has it been restricted or limited in motion ever since the injury?

A. Yes sir.

Q. It has been no better at any time since the injury?

A. No sir.

Q. Your left arm and hand?

A. Yes sir.

Q. Do you feel that you have strength so you are able to lift and handle it as formerly?

A. No sir.

Q. I mean even with the limitation it has now?

A. No sir.

Q. What weight can you carry with your left arm as compared with what you might carry or lift before you were hurt?

A. I cannot carry only very little weight with it; can't carry a light satchel for any length of time.

Q. Suppose you had a weight as heavy as a Revised Statute like this how long could you hold that and carry it?

A. I couldn't carry that long.

Q. Would you be able to put two of them in a grip and carry it?

A. No sir.

111 Q. In what way does it give you trouble?

A. In taking hold of anything with this hand it catches me here.

(Witness points to a place on the outside of the arm just below the shoulder joint.)

Q. You mean up and down the place where you were injured?

A. Yes sir.

Q. What do you mean by saying it catches you there?

A. It starts to pain me there.

Q. Then it is the pain caused by the weight which prevents you carrying it?

A. Yes, I've got to leave it go.

Q. What is the fact to letting your left hand hang, simply with its own weight? What is the effect on that, and your shoulder and arm?

A. If I walk any distance, three or four blocks, my arm will start to pain and the pain will increase.

Q. What do you find it necessary to do?

A. I raise it up and put it in my pocket where it will rest it or hold it like this (Holding left hand with right) and it relieves me.

Q. Is the pain in your left arm getting any better?

A. No sir.

Q. What is your general condition as to vigor and strength?

A. Very poor.

Q. In what way?

A. Weak.

Q. How do you determine that?

A. Loss of weight.

Q. How much weight have you lost?

A. My average weight was from 55 to 60.

Q. You mean from 155 to 160?

- A. Yes, and I weight 129 now.
- Q. How soon after this injury did you lose this weight?
- A. Why, when I got up and around I weighed myself and I seen I lost 18 pounds.
- Q. Have you ever gained it back?
- A. No sir.
- Q. Your weight has continued to decrease?
- A. Yes sir.
- Q. What efforts have you made to do work and what do you experience when you make such efforts?
- A. I tried to split wood and I couldn't with any success; and I tried to make garden and I had to give it up.
- Q. What kind of garden work did you attempt?
- A. Planting potatoes.
- Q. That isn't very hard work?
- A. Not if you are a strong man.
- Q. What did you experience?
- A. My weakness and the use of my arm.
- 112 Q. Where were you weak?
- A. My general system was weak; I was weak all over.
- Q. How about walking? What have you experienced in walking?
- A. I walked out to the mill one day——
- Q. How far is that?
- A. I should judge about a mile, and coming back from there I had to sit down four or five times on the road to rest.
- Q. How long ago was that?
- A. That was about six weeks ago.
- Q. Does your back give you any trouble?
- A. Yes, my back is weak.
- Q. Do you have any other trouble with your back that you are conscious of?
- A. When I sit for a long time, in straightening up if I try to straighten up quick I can't. I have got to get up gradually on account of it being lame.
- Q. You can't jump up quickly?
- A. No sir.
- Q. Where is your lameness?
- A. A little above the hips.
- Q. Did you have any such trouble before you were injured?
- A. No sir.
- Q. What sensation do you have, if any, on such occasions?
- A. I have a dizziness in my head.
- Q. When do you feel it?
- A. If I turn around suddenly or turn back my head will reel; sometimes I will stagger. If I stoop down for any length of time at all, when I raise up my head will get dizzy and my eyes seem to blur.
- Q. Did you have any such trouble as that before your injury?
- A. No sir.
- Q. Have you had any trouble since that injury with your lungs?
- A. ——.

Objected to as incompetent unless brought out through competent testimony in connection.

Question withdrawn.

Q. Have you had hemorrhage?

A. Yes sir.

Q. Night sweats?

A. Yes sir.

Moved to strike out the testimony as incompetent and no foundation to show it had anything to do with the accident.

Motion denied. Exception.

113 Q. Have you consulted a physician for that trouble?
A. Yes sir.

Q. Whom?

— Dr. Connell of Fond du Lac, Dr. Donohoe of Antigo, Dr. McMahon of Milwaukee and Dr. Levings of Milwaukee.

Q. That is the Dr. Levings who was once located here in the city of Appleton?

A. Yes sir.

Q. Do you feel now able to engage in any manual or heavy labor?

A. No sir.

Q. Have you any other means than manual labor?

A. No sir.

Q. State whether or not (you) tire very easily?

A. Yes, I do, very easily.

Q. Does this attendance in court tire you?

A. Yes sir.

Q. What were you earning at the time you were injured?

A. \$2.95 a day.

Q. How many days in the month did you work?

A. I worked every day in the month; there were some months I didn't work every day.

Q. Then you worked more than the regular working days of the month?

A. Yes sir.

Q. Had you been getting that wages for some time?

A. I got \$2.35 when I started dispatching.

Q. How long had you been getting \$2.95 a day before you were hurt?

A. I think it was two or three years.

Q. What was the condition of your health before you were hurt?

A. The condition of my health was all right.

Q. Did you lose any time?

A. Yes, I lost time.

Q. In substance amounted to what?

A. I have been off a week—two weeks.

Q. Was that very often?

A. No.

Q. You lived in Antigo at the time you were hurt?

A. Yes sir.

- Q. What were your hours when you were working as dispatcher?
A. From six in the morning until six at night.
Q. Did you have any time off to go home between to dinner or did you have to take your lunch with you?
A. Yes, took my lunch.
Q. So you put in practically twelve hours a day?
A. Yes, at meal times was my busiest time.
Q. I suppose more engines in that time?
A. More engines at noon.
Q. Did you have any talk with Mr. Kane shortly after you were injured?
A. Yes sir.
Q. The engineer?
A. Yes sir.
- 114 Q. What time was that?
A. After I got around and out.
Q. It wasn't that day or the next?
A. No sir.
Q. I thought he saw you at your home?
A. He did.
Q. Have you had doctor bills?
A. Yes sir.
Q. Do you know the amount?
A. All but the last attendance.
Q. How much did you have to pay out for doctor bills?
A. \$127.00.
Q. And you still have bills?
A. Yes.
Q. Are you being treated now?
A. Yes, that is I have prescriptions for medicines.
Q. That is, the doctor prescribed for you and you are taking his medicine?
A. Yes sir.
Q. Are you able to tell us what you have been compelled to pay out for that medical attention?
A. No sir.
Q. I mean for the medicine?
A. For medicine—I paid out about \$3.00 I should think.
Q. Was the clothing that you were wearing at the time torn by the blow?
A. Yes sir.
Q. Were you carrying a watch at the time?
A. Yes sir.
Q. What happened to that?
A. The back of it was bruised in, pushed in and the case of it was broken, the glass was broken.
Q. What expense do you figure for fixing that?
A. I don't remember what it was. I think my wife paid for it.
Q. Was it badly smashed?
A. The case was dinged in but I got it straightened, and the crystal was broken in front.

Cross-examination by Att'y SMART:

115 STATE OF WISCONSIN:
County of Outagamie:

In Municipal Court for Said County.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Cross-examination of WILLIAM H. GRAY by Att'y SMART.

Q. Mr. Gray what time in the morning did you say you went to work on the day of the accident?

A. Six o'clock.

Q. You say you helped put in three engines there that morning?

A. Yes sir.

Q. You don't remember what they were do you?

A. Why, I remember there were two switch engines and a road engine to my knowledge.

Q. That is a freight or passenger?

A. Passenger engine.

Q. Didn't you put in four engines that morning before engine 1066 came in or don't you know?

A. Why, I didn't count them at the time. I suppose afterwards when you asked if I put in three engines I think I said I put in three engines.

Q. That is right?

A. That is what I stated.

Q. Was there an engine came in at six o'clock or about with Webster as engineer? Do you remember that?

A. I don't remember the engineers because I didn't see them.

116 Q. You remember putting that switch engine in don't you?

A. I couldn't say now.

Q. Did you put in an extra freight engine at seven o'clock with Kelley as engineer?

A. No sir.

Q. Do you suppose that engine of Webster's that came in at six o'clock was put in before you got there?

A. If it came in at six o'clock it must have been there when I got there.

Q. You would have to take care of it?

A. Yes sir.

Q. Do you remember train No. 114?

A. Yes sir.

Q. That is a passenger train?

A. Yes sir.

Q. Did you put that engine in?

A. Yes sir.

Q. Who was the engine man on that?

A. I didn't see him.

Q. Do you know who was running on that?

A. No, I don't recollect; I think there was an extra man on.

Q. Do you know a man by the name of Duggan with Lyman as fireman?

A. Yes sir.

Q. Did you put in any switch that came in about 7:45 with Poss as engineman?

A. No sir.

Q. You didn't put that in?

A. No sir.

Q. Who put that in?

A. I dispatched an engine that went switching; I didn't put it in; that was before seven o'clock. I didn't put in any engine at 7:45.

Q. Do you remember Poss coming in with an engine?

A. Yes sir.

Q. Do you know Vanderay the fireman?

A. Yes sir.

Q. You can remember them coming in that morning?

A. I didn't see them.

Q. Do you remember an engine man by the name of Tate with Anderson as fireman?

A. Yes sir.

Q. Did he come in there that morning and did you put his engine away?

A. I couldn't say; I didn't see him.

Q. Do you know engine No. 307?

A. I think I have seen her.

Q. Did you hostile that that morning?

A. I don't know.

117 Q. You don't know how many engines you did hostile?

A. I know that I put away three engines and possibly I might have put away the fourth. I put away engines and never look at the number.

Q. Don't you remember that when the fourth or fifth engine was in there that morning that you came to work that you left Rock and the pit men to take care of it and you went up town?

A. At what time?

Q. Somewheres about eight o'clock or a little after?

A. No sir.

Q. That isn't so?

A. No sir.

Q. Didn't you leave your place there at about eight o'clock and while Rock and Krieska were hostling an engine and putting it on the pit?

A. No sir.

Q. You didn't?

A. No sir.

Q. You are positive about that?

A. Yes sir.

Q. You know Tony Krieska?

A. Yes sir.

Q. He was the cinder pit man that was on duty that forenoon?

A. Yes.

Q. Isn't it a fact that you don't remember of going off and leaving them to hostile that engine?

A. No sir.

Q. Didn't you go up town that morning after you put in the third or fourth engine?

A. Yes sir.

Q. You did go up town then?

A. Yes sir.

Q. Was there an engine on the track when you went up town?

A. No sir.

Q. None at all?

A. No sir.

Q. You went right up after you hostled the last engine that came in?

A. Yes sir.

Q. What time was that?

A. That was maybe a quarter after seven—about that.

Q. You are sure it was before eight o'clock?

A. I mean a quarter after eight o'clock.

Q. Was there any engine on the track at that time when you went up town?

A. No sir.

Q. Where did you come from when you started up town?

A. I went from the engine house.

118 Q. Which way?

A. South.

Q. Along what track or road or path?

A. I went on the west side of the coal shed.

Q. I show you a photograph marked Defendant's Exhibit "4" and ask you to look at it. Is that a fairly correct picture of the path and roadway leading from the round house down south along the west side of the coal shed?

A. Yes sir.

Q. And to the right at the bottom of the picture is the coal shed?

A. Yes sir.

Q. And up over that part of the coal shed comes the trestle or elevated track on which the coal cars are taken to the coal shed?

A. Yes sir.

Q. When was the first time that morning that you gave orders to anybody to put water on the coals and cinders on the cinder pit?

A. When the passenger engine was standing on the pit.

Q. That is 114?

A. Yes sir.

Q. You don't remember whether that was the last engine you dispatched or not?

A. That was the last engine.

Q. That was the last engine you dispatched before you went up town?

A. Yes sir.

Q. You remember that positively do you?

A. Yes sir.

Q. I sometimes use the word dispatch an engine and sometimes hostile an engine. That means the same thing does it not?

A. Yes sir.

Q. Sometimes one word is used and sometimes the other?

A. Yes sir.

Q. And as dispatcher you are sometimes called hostler?

A. Yes sir.

Q. Before this train No. 114 came in, whose engine was the last you dispatched, what had been the condition of the fire in the pit?

A. The condition of the pit seemed to me as though it wasn't shoveled out that night or the afternoon before.

Q. I am referring to the fire?

A. There was a lot of fire all the time.

Q. On train 114 was the engine number 949?

A. I don't remember.

Q. Do you remember where that engine dumped its coal?

A. Towards the north end.

119 Q. How many sections are there in that cinder pit?

A. I don't know what you mean.

Q. There are steel cross ties across that cinder pit are there not?

A. Yes, braces or ties.

Q. And these cross ties divide the pit into sections?

A. Yes sir.

Q. The cross ties do not extend to the bottom of the pit?

A. No, sir.

Q. And right under these cross ties are supports that rest on the bottom of the pit?

A. Yes sir.

Q. These supports are spliced to the rail at a point where the cross tie joins the rail?

A. Yes sir.

Q. Calling each one of these spaces between these cross ties sections how near the north end of the cinder pit would you say it was that this engine or train No. 114 dumped its coal and cinders, first, second, third or fourth section?

A. I couldn't tell as to that. It must have been the third or fourth section.

Q. That is your best recollection?

A. Yes sir.

Q. Before 114 dumped its coal there you didn't notice that there was coal in there burning?

A. Yes sir.

Q. But you didn't give any order to put water on prior to that?

A. No.

Q. But when you came to hostile 114 the fumes and smoke from the dump bothered you when you were on the engine?

A. Yes sir.

Q. And that time just before you moved the engine off the cinder pit you told Krieska to throw water on there did you?

A. Yes sir.

Q. That hose was kept there and used constantly for that purpose?

A. Yes, that is what it was there for.

Q. One of the ordinary operations wasn't it—that when you were dumping coal some one would pour water right on it the same time?

A. Yes sir.

Q. Who generally did that?

A. The cinder pit man.

Q. Had they been doing it all that morning or not?

A. No sir.

Q. They had not been doing it?

A. They hadn't been doing it the way they ought to.

Q. Were the cinder pit men under your directions?

A. I was supposed to look after the interest of the pit and
120 the surroundings.

Q. He had to take care of the coal so that it would not interfere with the dispatching of the engines?

A. Yes sir.

Q. And you had a right to tell him what to do about that and you did tell him did you?

A. Yes sir.

Q. Just when was it that you told him about putting this water on these hot coals and cinders on the pit? That is with reference to the time when you pulled in engine of train 114 into the cinder pit?

A. Before.

Q. While you were dumping coal and cinders?

A. Yes sir.

Q. And did he go to work immediately throwing water on there while you were doing this?

A. No sir.

Q. He didn't commence that until you pulled the engine off?

A. No sir.

Q. Then did you see him do it?

A. No sir.

Q. You didn't watch him?

A. No sir.

Q. When you pulled the engine off the cinder pit where did you first take it to in front of the coal shed?

A. Yes sir.

Q. To put on coal?

A. Yes sir.

Q. Didn't you look back and notice whether he was pouring water on there or not?

A. No sir.

Q. How long did it take you to take care of your engine after you pulled it over the cinder pit?

A. Took probably 15 minutes—15 or 20 minutes.

Q. At the end of that 15 or 20 minutes would be when you delivered the engine to the round house?

A. Yes sir.

Q. That would be the completion of your handling of the engine?

A. Yes.

Q. And during them 10 or 15 minutes you didn't notice whether Krieska had been pouring any water on there at all or not?

A. No sir.

Q. If he had been you could have seen the steam coming from it?

A. If he had been pouring water on during that time? Why, if he was down there I could.

Q. You were on the engine weren't you?

A. I was on the engine while he was at the pit with the hose.

Q. You were on the engine while they were putting coal and water in there?

A. Yes sir.

121 Q. And you didn't look back to see whether he was doing that?

A. No sir.

Q. Could you hear it?

A. No, not down there. I couldn't see it if I did look back.

Q. Why?

A. Because there was steam there before I gave the orders to put it down and the steam was between him and me.

Q. You say there was steam. They hadn't been throwing any water in since six o'clock?

A. Not that I saw.

Q. You know they hadn't?

A. I wasn't positive; I wasn't down on the pit all the time watching it.

Q. Couldn't you hear whether he was turning any water on the cinder pits when you had your engine up past the coal shed?

A. No sir.

Q. Up past the water tank?

A. No sir.

Q. Too far?

A. Yes sir.

Q. You don't mean to say that when you and your engine were up where they dump coal it was too far to hear this sizzle of the water on the hot coals down there do you?

A. Yes sir, I didn't listen that time.

Q. It wasn't so far but what you could have heard it if you had listened?

A. I think it was.

Q. After you got your engine in the house, this engine of train 114 you then came down on the west side of the coal shed?

A. Yes sir.

Q. For what purpose?

A. I went down for the purpose of getting my check at the depot.

Q. You then started to go down town?

A. Yes sir.

Q. Didn't you go home and get your breakfast?

A. No sir.

Q. Are you positive in regard to that?

A. Yes sir.

Q. Weren't you in the habit of going home after coming out and hostling these engines when there was a lull in the business?

A. Sometimes and sometimes not.

Q. But you didn't that morning you think?

A. No sir.

Q. Did you have any talk with your helper, Mr. Rock, about your going up town and what time you would be gone?

A. No sir.

Q. Didn't you tell him you were going up town to get your check and get it cashed?

A. No sir.

122 Q. You didn't tell him that?

A. Not to my knowledge.

Q. Will you state positively that you didn't or that you don't remember?

A. I don't remember telling him.

Q. You might have told him and forgotten it now?

A. I might have but I don't think so.

Q. You came down the west side of the shed and then went to the cinder pit did you?

A. No sir.

Q. You went by the cinder pit?

A. Yes sir.

Q. Didn't you go to the cinder pit there for the purpose of seeing whether Krieska had followed out your orders or not?

A. No sir.

Q. In going up town?

A. No sir.

Q. You don't know whether Krieska was there pouring water on those cinders when you went by the cinder pit to go to town?

A. When I went by the cinder pit going to town I cut a little bit and went right to the south end of the coal shed and I saw Krieska crossing the west fence on the west side of the right of way, coming I suppose, towards the pit.

Q. That west fence is one that is there on the west side of the coal shed?

A. Yes sir.

Q. He was going through that fence?

A. He was going over it.

Q. What was there in there west of that?

A. There were buildings and sidetracks. He was coming from the directions from where he lives.

Q. He lives west of the coal shed property?

A. Yes sir.

Q. That was the last you saw of him before you went up town?

A. Yes sir.

Q. What is your best judgment as to the exact time when you went up town?

A. I should judge it was about twenty minutes after eight; 15 or 20 minutes after eight I should judge.

Q. How long did it take you to hostle that last engine? We will say the engine of train 114.

A. After I took care of it.

Q. After you took hold of it?

A. To the best of my knowledge between 15 and 20 minutes.

Q. That would be the usual ordinary time would it?

A. For that engine it would I should judge.

123 Q. Do you know anything about requiring the registration of engines and engineers when they come in?

A. Yes, I know there is such a thing in existence.

Q. Do you know the practice of keeping that?

A. Yes sir.

Q. If it should appear that that register registered in at 7:18 that morning what would that mean with reference to the time when you took hold of the engine? Would that time on the register be before or after you took hold of it?

A. After.

Q. Would the engineer register in this book before or after you took hold of the engine?

A. After—

Q. He would go from his cab directly up to the round house and register in the arrival?

A. Yes sir.

Q. If that registration as to time is correct you must have taken hold of this engine of train 114 before 7:18 in the morning?

A. I don't think I did.

Q. I am saying if the registration is correct that would be true?

A. Supposed to be.

Q. If it only took you 15 or 20 minutes then, figuring the time that way, you might have left to go up town before eight o'clock?

A. No sir, I didn't.

Q. You can't tell looking back now as to just the time each and every day that you made each and every movement?

A. No sir.

Q. You can't tell by looking back now and say just what time it was when you looked at your watch any particular time?

A. No sir.

Q. Looking back the records would be a better evidence?

A. Yes sir.

Q. And you know that customarily it takes from 15 to 20 minutes to hostle an engine?

A. No sir.

Q. That is what you stated a minute ago?

A. No sir, I meant that class of engines.

Q. It wouldn't take over a half hour would it?

A. With a big fire in that engine it would.

Q. But you have no recollection of there being a big fire in that engine?

A. Not in particular, no sir.

124 Q. Did you hostile any other engine that morning after this engine of train 114?

A. No sir.

Q. You are positive in regard to that?

A. Yes sir.

Q. How long were you up town?

A. Why, I was up town about a half hour or a little over; probably 45 minutes.

Q. Did you go up town more than once?

A. No sir.

Q. You didn't get back from town until just before engine No. 1066 pulled in did you?

A. No sir, I don't know when she pulled in.

Q. You were just coming back from town when you were struck by 1066?

A. No sir.

Q. How long had you been back before you were struck by 1066?

A. Oh, probably 45 minutes I had been back.

Q. Did you see Engineer Bush that morning on the way up town?

A. I saw him at the cinder pit—somewhere there.

Q. When?

A. I don't just remember, I think it was somewhere around eight o'clock.

Q. Did he bring in an engine that morning?

A. No sir, he went out that morning.

Q. Where did you meet him?

A. I saw him near the cinder pit.

Q. Did he have his engine with him?

A. I couldn't say as to whether his engine was on the going out track east of the sand house or in the yard.

Q. Was that after you had hostled the engine of train 114?

A. Around about that time, yes.

Q. You were not hostling that engine at that time?

A. No sir I was standing on the ground.

Q. You had finished that job?

A. I couldn't say whether it was; I think it was while the engine was standing on the pit before I took it to the house.

Q. And you arranged with him to take his check to town and to get it cashed for him?

A. Yes, he asked me to take it along.

125 Q. And you took it along and you went to the depot and got your own check?

A. Yes sir.

Q. Where did you go up town?

A. I went to Mr. Resick's store.

Q. What does he keep?

A. He keeps a grocery store right across from the depot.

- Q. He was the city treasurer also at that time?
A. Yes sir.
Q. He cashed your check there?
A. No sir.
Q. He cashed Brush's.
A. Yes sir.
Q. Why didn't you cash yours?
A. He didn't have money enough.
Q. Where did you go from there?
A. I started across the corner towards the roundhouse and across the street on the corner and I went in a saloon there.
Q. Whose saloon?
A. His name is Cheslack.
Q. What did you do there?
A. I tried to get my check cashed.
Q. Did you get it cashed?
A. No sir.
Q. Did you buy anything in there?
A. Yes sir.
Q. What?
A. I bought a glass of brandy.
Q. Did you buy a bottle of brandy?
A. No sir.
Q. Did you buy a bottle of liquor of any kind?
A. No sir.
Q. How long did you stay in there?
A. I was in there about from eight to ten minutes.
Q. Where did you go from there?
A. Direct to the engine house.
Q. You didn't get your check cashed then?
A. No sir.
Q. What street is this saloon on that you refer to?
A. That is on Door Street and Fifth Avenue, if I remember right.
Q. Fifth Avenue is north or south of the depot?
A. That is north of the depot.
Q. The first street north, is that right?
A. Yes sir.
Q. And Door street is a north and south street?
A. Yes sir.
Q. And that is east or west of the main tracks of the Railway Co.?
A. It is west.
Q. When you state you went from the depot towards the coal shed you simply meant you went across Fifth Avenue or
126 Door Street where you went into this saloon?
A. I went from the depot across Door street to the grocery store.
Q. And then you went from there—the grocery store, to the saloon?
A. On my way to the engine house; just across the street north.
Q. Both the grocery store and the saloon are on Door street and Fifth Avenue?

A. Yes sir.

Q. How did you go from that saloon up to the engine house?

A. I got from the saloon up to the engine house down Door street until I struck the path from Third avenue—the path is west of the railroad and coal shed,—and continued on then until I got to the engine house.

Q. That is the path that runs up on the west side of the coal shed and this extends the street along the coal shed clear down to Third Avenue.

A. Yes sir.

Q. That is the road that is used in teaming and by persons to get onto the premises from Third Avenue?

A. No sir.

Q. Does it widen onto the road?

A. No sir.

Q. It is west of the coal shed isn't it?

A. Yes, two teams can pass there west of the coal shed.

Q. And they can on the road extending the same way clear down to Third Avenue?

A. Yes sir.

Q. And it is by that road that you came?

A. Yes sir.

Q. When you came up there you say that was about how long after you went down town?

A. It probably was to my judgment about 10 minutes after nine.

Q. That would be nearly an hour after you left the engine house after putting the engine on 114?

A. No, I don't think it was that long.

Q. You said it was 15 or 20 minutes after eight when you went down town?

A. Yes.

Q. That would be nearly an hour then?

A. About 50 minutes probably.

Q. It must have been 50 minutes. When you went by the cinder pit what did you see there?

A. I saw steam and smoke.

Q. Krieska wasn't there?

A. No, sir, unless he was on the other side of the steam
127 shoveling.

Q. You didn't see him did you?

A. No sir.

Q. Didn't he generally go to breakfast about that time?

A. Not to my knowledge.

Q. You don't know?

A. No sir.

Q. Don't you know what his custom has been?

A. No sir, I have seen his breakfast brought to him.

Q. Sometimes he would go?

A. Yes sir.

Q. Was there anybody pouring water on that cinder pit on the

coals and ashes the time you passed north of the engine house or round house about 9:10—anybody there that you could see?

A. No sir.

Q. Did you see Rock there?

A. No sir.

Q. Did you see anybody that saw you go north of the engine house?

A. No sir, I didn't see anybody.

Q. Where did you go when you went to the engine house?

A. I went to the engine house and went to the toilet and came back and stopped around there; went into the engine men's room.

Q. Who did you meet there?

A. I don't remember whether there was anybody in there just then or not.

Q. You can't remember of meeting any particular person there that time?

A. No sir.

Q. How long did all that take you there at the engine house after you got there about 9:10?

A. I should judge about 15 minutes, or 10 minutes something like that.

Q. That would be somewhere about 30 or 35 minutes you were there at the engine house, is that right?

A. Yes sir.

Q. And from there you went south as you told us down to the cinder pit? Is that correct?

A. Yes sir.

Q. You didn't see Rock on the way down to the cinder pit?

A. No sir.

Q. Now, are you clear in your recollection as to what you saw or heard or did around there during those times that you have testified to?

A. Why to the best of my knowledge at this time.

Q. You can't remember who was there in the engine house at all can you?

128 Q. No sir, it is a very frequent thing for me to go in and out of that engine house and not notice anybody to speak of or speak to anybody.

Q. And when you went down to the cinder pit you say you went to see if he had been putting water on those hot coals and cinders as you had directed?

A. Yes sir.

Q. The only man working that forenoon was Tony Krieska?

A. Yes sir.

Q. And you are not positive you actually saw him throwing water on those cinders when you went back there?

A. Yes sir.

Q. Are you positive?

A. Yes sir.

Q. Don't you know he was at breakfast and didn't get back until after you go hurt

A. No sir, I don't know where he was.

Q. You wouldn't swear positively that you saw him throwing water on those hot cinders when you went back there to look and see what he was doing?

A. Yes sir.

Q. And he was there when you started north from that cinder pit just before you got hurt?

A. Yes sir.

Q. And he was up there when the engine pulled by 0-1066?

A. Yes sir.

Q. You are positive of that?

A. Yes sir.

Q. You have told several different stories about what happened that time haven't you Mr. Gray?

A. Not to my knowledge.

Q. Don't you remember of being examined before a commissioner up there at Antigo?

A. Yes sir.

Q. At that time you told us when you came down to see whether Mr. Krieska was putting water on the cinder pit as you told him that you had just returned to the engine house after having put in and hostled the engine?

A. Yes, I went down there after I hostled that engine.

Q. I am asking you if that isn't what you testified to?

A. Yes sir.

Q. Let me ask if you gave this testimony before John A. Ogden, court commissioner in and for Langlade County, on the 5th of June, 1912, on page three. "Q. When was it with reference to the time you took care of the engine that you gave instructions to put water on the pit? A. When I had the engine on the pit the amount

129 of smoke and gas came up and around the engine that it was almost impossible to inhale and I told the men to get busy and put the fire out because some heavy engine might come in

and go into the pit. Q. You told the cinder pit men? A. Yes sir. Q. You went on and took the engine over to the round house?

A. Coal shed and water tank. Q. Took care of it the same as you testified? A. Yes sir. Q. You came out of the house and back

to the cinder pit? A. Yes sir. Q. Why were you going back there? A. I wasn't going back there; I was going to the shanty.

Q. Why? A. That was the place to stay." Did you so testify?

A. Yes sir.

Q. Do you remember your statement of this trip that you there stated was made immediately after you took the engine to the round house; that when you came down just before you got hurt you were just returning from having put the engine in the round house?

A. I didn't mean it that way.

Q. You understood those questions?

A. Yes sir.

Q. You went on and took the engine to the round house, coal shed, water shed; took care of it according to the testimony?

A. Yes sir.

Q. You came out of the round house to go back to the cinder pit?

A. Yes.

Q. Then you told what wasn't right. You want to correct that now, don't you?

A. No sir, I don't. That is what I told you.

Q. It isn't right is it?

A. Yes sir, it is.

Q. You weren't coming right back from putting that last engine up there?

A. No, sir, but I stated I answered that question.

Q. You say here in this question which was as to whether you went to take this engine to the round house that you went back to the cinder pit?

A. Yes, I went back to the cinder pit.

Q. I am not asking you what you did. This question is fair enough.

A. I went back to the cinder pit.

Q. The testimony in this deposition that was taken before Mr. Ogden was clear enough to you?

A. Yes sir.

Q. You have talked this testimony over with Mr. McMahon and Mr. Martin.

A. No, sir.

Q. You haven't talked it over at all?

A. No sir.

Q. You haven't read this deposition or testimony there
130 that was taken before Mr. Ogden since that time?

A. Yes sir.

Q. You talked that over with Mr. McMahon?

A. No sir.

Q. Not at all?

A. No sir.

Q. You talked this testimony over with your lawyer—what your testimony was?

A. No sir.

Q. Not at all?

A. No sir.

Q. You understand me?

A. Yes sir. Mr. McMahon asked me if I was down town that day.

Q. What did you say?

A. He says "I want you to tell the truth. Were you down town?"
I said "Yes." That was all was said.

Q. On your re-examination you never suggested in any way to me that you were down town an hour or more?

A. You never asked me.

Q. You gave me to understand that you came right from hostling that last engine and right to this cinder pit immediately before you got hurt didn't you?

Objected to for the reason the testimony is here and can be offered in evidence.

Q. While you were walking down that track from the engine house and looking at the cinder pit just before you got hurt, did you hear any other engine bells ringing in the yard?

A. I heard—I don't know whether it was going down or not.

Q. When you were on your way down to the store you looked at the cinder pit?

A. No sir, I didn't.

Q. Do you mean to say you didn't hear any or you don't remember.

A. When I went down to look at the pit I don't remember of hearing any.

Q. Did you hear any or don't you remember?

A. I didn't.

Q. You wish to testify you didn't hear any?

A. Yes sir.

Q. You can tell the difference between a switch engine and a road engine bell?

A. No sir.

Q. They sound all alike to you?

A. No sir, there is not enough difference to tell if I don't see the engine.

131 Q. You didn't learn enough to recognize the sounds of the different engines after working around there 14 or 15 years?

A. Not easily. When I started to work there there were small bells and big bells but now they are all the same size practically, with practically the same tone.

Q. Isn't it a fact Mr. Gray that you did know that this train on your engine 1066 was in when you went down there to the cinder pit? A. Isn't that a fact?

A. No sir, I didn't know.

Q. You didn't know or didn't hear any engine coming up there and pulling in at that time?

A. During what time?

Q. Just before you went down to the cinder pit?

A. No sir.

Q. Do you know Mr. Piersol, the gentleman sitting just back of me?

A. I met him.

Q. You met him at Antigo on February 2, 1911?

A. I met him at Antigo; I don't just remember the date.

Q. Do you remember how long it was after you got hurt?

A. May have been a week or so.

Q. Might have been more?

A. Yes.

Q. May have been three weeks?

A. No sir.

Q. February 2nd would be about right wouldn't it?

A. I think, if I remember right it was the latter part of January. I think it was but I am not sure.

Q. Where did you see him?

A. In my house.

Q. Were you in bed or up around?

A. I was in bed.

Q. Sure of that?

A. Yes sir.

Q. Who was with him?

A. I think his name is Mr. Gagen.

Q. You know who he is?

A. I have seen the man.

Q. You had seen him there before?

A. No, that is when I first learned his name.

Q. He was court reporter at the Municipal Court at Antigo?

A. So I understand.

Q. And at that time you made a verbal statement to Mr. Pearsall in the presence of Mr. Gagen?

A. Yes sir.

Q. Did you notice whether Mr. Gagen took this conversation down in short hand or not?

A. I don't know whether it was shorthand or not.

Q. He had a book and paper there and was writing it down?

A. Yes.

Q. Do you remember what you told me at the time you were making that statement?

A. I think I would if it was recalled.

Q. Your mental condition was all right that time was it?

A. I think it was, yes.

Q. What time do you claim this accident happened this morning in question?

A. It happened I should judge a little before ten.

Q. What makes you think it was a little before ten?

A. I have got to use the same judgment of that time as the others because I didn't look at my watch.

Q. You may be mistaken in regard to that?

A. I may possibly.

Q. If it should appear that that train registered in at 10:30 A. M. you wouldn't testify that the accident occurred before ten?

A. If the train registered in at 10:30? I can't tell as to what time the train registered in; it wouldn't have much to do with the time the engine got to the shed.

Q. Were you asked by Mr. Piersal in the presence of Mr. Gagen on February 2, 1911, this question "Q. What time of the day did this accident happen?" A. About 11 o'clock in the forenoon, I think.

Q. Did you make that statement at that time?

A. If it was put down I suppose I did.

Q. You don't deny but what you made it do you?

A. It doesn't seem possible that I did make that statement. I wouldn't see anything in view for making it.

Q. You don't see any reason why you would state it wrong?

A. No sir.

Q. And that was a short time after the accident and your memory would be better then than now?

A. Well, practically the same.

Q. Don't you think two weeks or a week or ten days after the accident you can remember things better than you can a year or a year and a half?

A. Why, some things you might.

133 Q. And some things you might not?

A. Yes sir.

Q. You wouldn't say now but what that was about 11 o'clock at the time you got hurt would you?

A. No, I couldn't—that seems very queer that I should say it was 11 o'clock—very queer.

Q. In this statement which I have referred to did you state as follows: "Q. You say you took the engine to the house and then came back to go into your shanty? A. Yes, but I didn't go in. Q. Where did it stand? A. If there was an engine there at all the engine must have come in after I was there. Q. Was the engine coming in at the time it struck you? A. Yes sir. Q. Was the engine coming in at the time it struck you? A. Yes sir." Did you so state to Mr. Gagen and Mr. Pearsall?

A. That the engine was coming in when it struck me. Was that the question?

Q. Did you so state to them?

A. Yes sir.

Q. You mean by that you were just returning from putting the engine in the house?

A. Yes sir.

Q. Just before you got hurt?

A. Yes sir.

Q. How far now do you claim it was that you were north of the cinder pit when this engine struck you? A. Right opposite the door of your shanty?

A. Just about, I should think.

Q. Was it within 30 or 40 feet of that (indicating on drawing) or is that just about the exact place?

A. I may have been 3 or 4 feet north of the shanty or I may have been in front of it. I don't know. I think I was a little bit north of it to the best of my knowledge.

Q. The front door of that shanty is about 67 or 69 feet from the cinder pit?

A. Yes sir.

Q. Couldn't you have been 30 or 40 feet from the cinder pit when you were struck?

A. No sir, I think I was further than that.

Q. You know you were further?

A. Yes sir.

Q. You know about what a car length is?

A. Yes sir.

Q. You know you were further away than a car length when you were struck?

A. Yes sir.

Q. You are just as positive of that as you are the bell
134 wasn't ringing?

A. On account of the distance of the shed and where it crosses there I am not.

Q. It makes you just as positive of that as you were of the ringing of the bell?

A. Yes sir.

Q. In your statement to Mr. Gagen and Mr. Pearsall did you state as follows:

"Q. How far from the cinder pit was it where it struck you?

A. It must have been a car length.

Q. 30 or 40 feet?

A. About that I think."

Q. Did you make that statement?

A. Yes, I did if it is down there.

Q. And you thought it to be true that time did you?

A. Yes sir.

Q. Why have you changed that statement Mr. Gray? Have you talked it over with your counsel?

A. No sir.

Q. Why have you changed it?

A. Because I was guessing it some at that time but the blood that I lost when I got hurt was a little bit, I should judge, at this side of the shanty on the ground.

Q. A little bit north or south?

A. A little bit south.

Q. You said a few minutes ago the way you judged it you were north of the shanty when you were struck?

A. I told you I couldn't exactly tell because I was hurt.

Q. You won't change that?

A. No sir.

Q. Where are you going to leave it—north or south of the shanty?

A. I leave it where the blood was. I guess that is about as good a proof as anything.

Q. How far would that be south of the front door of the shanty?

A. Almost in front of the shanty. It must have been from the blood diagonal to the south corner of the shanty.

Q. That would be four or five feet south of the center of the door of the shanty?

A. Yes, it might have.

Q. You might have been struck quite a ways and thrown a distance?

A. No, I was rolled.

Q. You may have been rolled 25 or 30 feet?

— No sir, I don't think so.

135 Q. Don't you think that blood was where the body finally stopped after the engine went by?

A. It probably was, yes.

Q. How far do you think you rolled?

A. The distance that I went as near as I can tell, judging from

the time I fell to the time I was released couldn't have been over three seconds, I should judge.

Q. How far do you think you rolled?

A. I don't know.

Q. You can't form any idea?

A. No sir.

Q. You might have rolled 25 or 30 feet?

A. No, I don't think that far.

Q. You think you rolled three seconds?

A. I think I did. I may not have.

Q. Is that your best judgment?

A. Yes sir.

Q. You think at the way the car was going it was going at least ten miles an hour?

A. Yes sir.

Q. An engine going ten miles an hour travels 14 feet in a second don't it? I tell you that it does. That is my calculation. If you were then rolling two seconds you would go at least 25 or 30 feet?

A. I don't know.

Q. Were you rolling as fast as the engine was travelling?

A. I don't think so.

Q. Were you rolling half as fast as the engine was travelling?

A. I don't know.

Q. You were rolling on with the engine?

A. Yes sir.

Q. You would have to roll half as fast as the engine?

A. I wasn't thinking about that. I did think about the engine letting go of me.

Q. If that engine was going 14 feet a second and you were rolling three seconds you must have rolled 25 or 30 feet.

A. I don't think that I would be here to answer that question today if I did.

Q. But you are quite positive you were rolling three seconds?

A. That is the best of my judgment.

Q. But you might be mistaken?

A. Yes sir.

Q. When you made that statement to Mr. Gagen and Mr. Pearsall you had another entirely different idea why you knew that engine 1066 was in the yard?

A. No sir. I didn't know anything about it. Oh, when I made the statement you mean? No, I didn't know she was in the yard before I got hurt.

136 Q. You knew there was an engine in the yard got in there a half hour before?

A. No sir.

Q. You are positive you didn't?

A. Yes sir.

Q. Didn't you state to Mr. Pearsall and Mr. Gagen that you knew the engine was there or would be along in a few minutes?

A. Yes sir.

Q. Let me read from this statement:

"Q. Did you know that engine was in the yard?

A. Yes sir.

Q. Did you know she would be coming in the house?

A. Yes sir.

Q. What time did she arrive here in the yard?

A. Perhaps a half hour before.

Q. Did you intend to take care of it?

A. Yes sir."

Q. Did you make those statements to them?

A. I must have if it is down there.

Q. If you made it at that time it was your understanding and belief that it was true at the time you made it wasn't it?

A. I must have thought it was at that time but I haven't had any knowledge of an engine being in the yard.

Q. You say now it wasn't true do you, even though that time it was?

A. Yes sir.

Q. What has made you change your mind?

A. Nothing that I know of.

Q. Haven't thought about it since?

A. No sir.

Q. Haven't talked about it with your lawyer?

A. No sir. I supposed it was the same way in that statement that I had in my knowledge at that time.

Q. Having made that statement less than two weeks after the accident wouldn't you say that statement is probably true?

A. No.

Q. Would you say it is untrue?

A. It is untrue because I didn't see the engine.

Q. What reason can you give for changing your story in that respect?

A. I cannot give any reason only that I didn't see any engine.

Q. You just stated now that you didn't see any engine. Maybe you saw the engine that came in from the south?

A. No.

Q. Can it be that you knew any engine came in there that would have to be hostled without knowing just what number it was?

A. No sir.

137 Q. You are positive that statement was untrue and that you didn't hear or see or learn of this being in there or of any other engine being in there that would have to be tended to by you shortly?

A. No sir, I didn't have any knowledge of that engine being in there.

Q. The ma-n tracks are about how many hundred feet to the east from the cinder pit track?

A. Maybe 200 or 300 feet.

Q. It was a bright clear winter day?

A. Yes sir.

Q. On that kind of a day you can hear an engine bell ringing all through the yards?

A. You can hear it quite a ways off if nothing else is to bother you, no noise.

Q. There was nothing else to bother you so far as you know?

A. No sir.

Q. You can hear them to the round house if an engine was there on the main track—you can hear it in there?

A. I don't know as I could to the round house.

Q. Wasn't it your duty to listen for that engine that was coming in to be hostled by you?

A. That were coming in to the coal shed.

Q. It was your duty to watch for them and take care of them?

A. Yes.

Q. And when you were at the engine house you would have to go to the cinder pit to take care of them?

A. Yes sir.

Q. And when you were up at the engine house you would listen for any engine that might come in and need you?

A. No, if I was at the engine house I would come out and look.

Q. You didn't come out and look?

A. Not that morning, no sir.

Q. You say you are positive that the bell did not ring or you would have heard it?

A. Yes sir.

Q. I suppose it was customary to ring those bells and you relied on that custom?

A. Yes sir.

Q. You knew they ought to ring the bell?

A. Yes sir.

Q. You knew that some one would be to blame if they didn't ring the bell?

A. Yes sir.

Q. After this accident you made out a written report yourself of the of the accident in your own handwriting?

A. No sir.

Def't's Ex. 5.

Q. I show you a report of personal injured- marked Defendant's Exhibit 5 which apparently bears your signature and ask you to look at it and see if it is in your hand-writing and is your signature?

A. No sir, it is not my hand writing, it is my signature.

Q. The writing in the body isn't your hand writing?

A. No sir.

Q. Who did fill in the body of it?

A. I think it was Mr. Mohl.

Q. Mr. Mohl who has been on the stand here?

A. Yes sir.

Q. Where were you when that was made out?

A. In bed.

Q. He came up there and asked you about what report you would make?

A. Yes sir.

Q. And filled the sheet right out there while you were there?

A. Yes sir.

Q. And you told him what the answer would be to the questions that were put?

A. Yes sir.

Q. And you told him the truth as you believed it to be at that time?

A. Yes sir.

Q. In answer to question No. 21 that is in your report did you answer as I read? "Q. Who was running the engine and was it properly handled? A. William Kane; couldn't say as to how the engine was handled." Did you state that?

A. Yes, but I had an object in view in doing so.

Q. Did you want to mislead them?

A. Yes sir.

Q. In answer to question No. 26 which reads as follows: "Q. What does the injured person say was the cause of the accident and who, if anyone, does he blame for it? A. Accident caused by view being obstructed by steam from pit; am unable to place the blame." You made that statement to them?

A. I didn't want to put the blame on anybody.

Q. Did you answer that question that way?

A. Yes sir.

Q. You did that for the purpose of misleading the railroad company did you?

A. No sir, I did that for the purpose of not censuring the employees or the company.

139 Q. You knew the railroad company would investigate what you said at that time?

A. They would know without my telling them.

Q. How would anyone else but you know if the engine was improperly handled?

A. I would be censuring Mr. Kane and the company; and that was my object in answering that question that way.

Q. You knew that it wasn't true at the time you answered it?

A. Yes.

Q. You knew that they would rely upon that and act upon it?

A. Yes.

Q. You knew that if you made that kind of a report that you couldn't lay the blame upon anybody and would act on the assumption of your telling the truth?

A. They wouldn't possibly blame anyone—just simply believe it. My brother came to me and he told me not to put any blame on anybody. He says the Company will use you right; don't blame anybody; leave that to the company. That was my object in answering that question that way.

Q. So that was the object in answering Mr. Pearsall and Mr. Gagen that way?

A. Yes sir.

Q. In making a statement that was untrue when the claim agent was coming to find out whether or not they would do something for you you told your story as you did, did you?

A. I don't quite understand that question.

Q. (Question read by reporter.)

A. Yes sir.

Q. When you walked down to the cinder pit from the north there, did I understand you to say there were no other bells ringing in the yard?

A. I don't know.

Q. When you walked down from the engine house to the cinder pit were there any other bells ringing in the yard or don't you know?

A. I don't know.

Q. You can't say one way or the other?

A. No sir.

Q. How is that—can engine bells be ringing around there without you hearing them?

A. Not if I am interested, in watching for them.

Q. But if you are not interested in watching for them it is a matter of common occurrence that an engine might come right up and the bell be ringing and you not hear it?

A. Yes sir.

Q. I suppose you might sit in your shanty and an engine
140 come right back on the coal shed track and you not hear it?

A. No sir, because that would mean work for me and I would look for the engine and be more apt to pay attention to the ringing of the bell.

Q. Could you hear the engine up to that shanty if the bell wasn't ringing?

A. I think I could.

Q. In the winter time when the ground is frozen there is more reverb-ration or shaking from an engine?

A. No sir, I don't think so.

Q. Is there any difference between the noise an engine would make in the cold winter and the summer time?

A. I don't understand.

Q. As I understand cold weather acts upon the rail joints?

A. Yes.

Q. That is why the rail joints are left loose—so they can expand or contract?

A. Yes sir.

Q. In real cold weather, 5, 10 or 15 degrees below zero these joints will expand?

A. Yes sir.

Q. That class of engine weighs about 150 tons?

A. Yes sir.

Q. When it passes over these joints, when you were there in your shanty watching to take care of an engine you would hear it more readily than the bell wouldn't you?

A. I might and might not.

Q. You know it is your duty to keep a lookout?

A. Yes sir.

Q. Does an engine when the bell isn't ringing make any other noise besides going over the track?

A. Yes, they do.

Q. What other noise do they make?

A. Safety valve blows off and the air pump works. The relief valve will make a noise loud enough.

Q. As I understand it if the engine isn't puffing the relief valve will have to work?

A. Yes sir.

Q. What are these relief valves?

A. They are a valve like that that checks the steam—like a vacuum to a cylinder. The pressure on the vacuum raises this valve and admits air to the steam cocks.

141 Q. Just sounds something like steam being turned into the cylinder heads.

A. No sir, a difference in the sounds.

Q. As loud or louder?

A. Mostly air sound.

Q. How does it compare with being as loud or not?

A. May be something similar of a similar noise but not quite as loud.

Q. How far could you hear that on a clear morning if you were listening and watching

A. If I were listening and watching I could probably hear it two car lengths.

Q. No further than that?

A. No, I don't think so.

Q. You are sure you could hear it two car lengths?

A. Yes, I think I could. In fact, I never tried the distance.

Q. You never made any experiments?

A. Never made any experiments of it.

Q. Have you ever noticed that during the winter an engine coming into the yard from work over the rails and cross-ties—did you ever notice the sound the engine makes over there?

A. Yes.

Q. Does it make any different sound than it does on the dry ground, than on the solid ground?

A. There might be a different sound.

Q. An engine coming over a bridge will make a little more noise than coming over solid ground?

A. Yes sir.

Q. And that structure of the cinder pit is something like an iron bridge?

A. Yes sir.

Q. Have you noticed that they make more noise coming over the cinder pit than in traveling along solid earth?

A. I don't know if there is any particular difference coming at a slow rate of speed.

Q. What do you call a slow rate of speed.

A. Six miles or something like six or eight.

Q. How about eight miles an hour?

A. I don't think there would be much difference in the amount of sound.

Q. Would eight or ten miles an hour be a low or high rate of speed coming across that cinder pit?

A. High rate of speed.

Q. That would make a good deal of noise?

A. No, not particularly.

Q. Quite a little.

A. No.

142 Q. How far do you think you could hear that noise coming over that cinder pit at ten miles an hour? As far as you could hear the relief valve?

A. It seems as though—no, I think I would hear the relief valve first.

Q. But you are not positive in regard to that?

A. No sir.

Q. Don't you know you can hear the chug, chug of that engine clear down to the switch if you stand down at your shanty?

A. No sir.

Q. You don't think you could?

A. No sir.

Q. As you left the round house to go down to the cinder pit just before you got hurt, as I understand it, you walked a little ways down the track?

A. Yes sir.

Q. And up to the north end of the sand house?

A. Yes sir.

Q. That would be but a short distance from the round house?

A. I think it would be over half ways.

Q. When you go to the north end of the sand house you turned over in the direction east of the track?

A. Yes, between the tracks to the sand house.

Q. That is a perfectly safe place to walk?

A. Yes sir.

Q. You walked from there down to about the south end of the blow off box—the south side of the blow off box?

A. No sir.

Q. You walked to the blow off box?

A. Yes, a few feet this side of it.

Q. What do you mean by this side?

A. The north side.

Q. You couldn't see where you were going as you walked down towards the cinder pit?

A. Not very well.

Q. You could see where you were going—could see the ground underneath your feet?

A. On the outside I could at intervals.

Q. You could see objects there?

A. At times I could and at times I couldn't.

Q. Do you mean to say that the smoke and cinders settled down to within a few inches of the ground so you couldn't see the ground?

A. It seemed to.

Q. The smoke and steam?

A. Yes sir.

143 Q. And it was a bright sunny day?

A. Yes sir.

Q. You saw the blow off box when you got to it?

A. I saw the east end of it plainly.

Q. You could see it plainly?

A. The east end of it.

Q. When you got to about that point you could cross at an angle so as to walk between the corner of the shed and the cinder pit?

A. Yes sir.

Q. You could have gone a little further down until you came to or very near the depressed track before you crossed there?

A. Well, no I couldn't. At the end of that depressed track there was a pile of ties to prevent cars from going over the end of the rails. Some of them were on the rails and some of them were north of the end of the rails.

Q. Down on the depressed track?

A. Yes sir.

Q. That depressed track is sunk somewhere about two feet nine inches?

A. Yes sir.

Q. And the north end of that track is a stone bottom the same as around the cinder pit?

A. Do you mean of the cinder pit track?

A. I mean the depressed track * the track that is down. A Stone wall extends along the north end of that depressed track?

A. No, not when I saw it. There was no stone wall there when I saw it at the north end of the track.

Q. Were those ties right on the ground at the north end of the depressed track?

A. Some of them.

Q. And some down on the track?

A. Some across the rails.

Q. How many of these ties were there up on the end of the depressed track—upon the level?

A. Well, I couldn't just exactly say, may be eight or ten.

Q. You could have walked down till you got to those ties couldn't you?

A. Why, I could have walked down over those but I preferred the track I did take.

Q. I show you Defendant's Exhibit "2," a photograph. You see a car standing in that depressed track?

A. Yes sir.

144 Q. You see some times on the ground level right at the end of the depressed track there?

A. Yes, I see something there.

Q. You can see that the end of the ties don't extend to the left only just about on a straight line with the end of the blow off box.

A. Yes sir.

Q. So if you had chosen you could have walked down until you

got within or about the end of those ties and to the north end of the cinder pit and then crossed over the track?

A. I could have walked a little further if I had chosen to do so.

Q. But you thought it advisable to cross at the blow off box?

A. Yes.

Q. When you were coming down there where did you first run into this steam and smoke from the cinder pit?

A. It started at the north end of the shed, more or less, it ran up over there and blew down through there.

Q. It ran up to about where the sand house was?

A. Further north but not as heavy—it rested lower.

Q. Did it obstruct your vision somewhat?

A. Somewhat.

Q. But nevertheless you walked down through that smoke and steam from the north end of the coal shed until you got clear down to the north end of the sand house?

A. Yes sir.

Q. To the north end of the sand house right down the middle of the track?

A. Yes sir.

Q. There was a place where you could have walked along the east side of the track?

A. No sir.

Q. There is the same place that there is along by the sand house?

A. No sir.

Q. Why not? Look again at Exhibit "3" and see if there is not a place along the east side of the track up beyond the water tank?

A. Yes, there is space there between the two piles but that space was never walked on and hardly ever shovelled and snow and ice is down the track there.

145 Q. What made them shovel it down that way?

A. They would shovel snow there and shovel it up against the water end of the water tank.

Q. After a snow storm how would the track be plowed?

A. I have seen engines plow it out and when too much snow would accumulate there they would have push cars.

Q. And the section foreman would clean it out from the round house?

A. Yes sir.

Q. I suppose that was hard ice?

A. Yes sir.

Q. The steam blowing out from the engines would thaw the snow and then when it was cold the water would freeze?

A. Yes, I have seen it freeze hard so I would have to pick it out and freeze to the tank and parts of the engine so the men would have to walk along the gang way.

Q. That condition existed at the time of the accident?

A. Yes sir.

Q. It was about the same west of the water tank to what it was north of the water tank?

A. Yes sir.

Q. When that did blow out there it would stay on there and freeze on the cylinder cocks when they were wet and made it icy?

A. Yes sir.

Q. That extended down beside the coal shed and to the west of the rails?

A. Yes, it did.

Q. You say that men frequently walked up this track north of the cinder pit to the round house?

A. Yes sir.

Q. That would be as I understand it simply you and your helper and the cinder pit men whenever they would come from the cinder pit to the sand house, and the coal shed men?

A. Yes sir.

Q. Weren't the coal shed men working in the coal shed most of the time?

A. Yes sir.

Q. Where else did these men work?

A. They worked in front of the coal shed principally shoveling coal back that came up from the chutes, when the chutes were being pushed off.

146 Q. Along there wherever they load coal on the engines does some coal drop between the engines and the east end of the sheds?

A. Yes sir.

Q. Was that a common occurrence?

A. Yes sir.

Q. And fill up there every day?

A. More or less.

Q. Sometimes so you couldn't walk along there west of the rail?

A. For a certain distance.

Q. What length do these coal sheds run along there?

A. There are five or six chutes there I think.

Q. What would be the total length of them?

A. They seemed to be about four feet wide.

Q. How much between each chute?

A. There might be two feet between them.

Q. About six feet then to each chute?

A. Yes sir.

Q. Along in there you say they would have to shovel out the coal every day?

A. Yes sir.

Q. Where would they shovel this coal to?

A. What they shoveled out they took to the round house.

Q. I suppose the section men would have to work in there from time to time?

A. Yes sir.

Q. Your men and the section men would have to work there if it was foggy?

A. Yes sir.

Q. Up in this northern country you quite frequently have foggy mornings?

A. Not to my knowledge.

Q. Early along in the morning, six or eight o'clock when there is snow on the ground isn't it quite frequently misty and foggy?

A. Not in cold weather.

Q. Well, in the winter time?

A. Not unless it would start to thaw or something like that, it might be foggy.

Q. What do these section men do if there is smoke and fog? How do they protect themselves?

A. They watch and listen.

Q. In the railway yards there are men in there work who walk the track along anywhere?

A. Yes sir.

147 Q. It is their duty to protect themselves to watch and listen?

A. Yes sir.

Q. They know there is a liability of a switch engine or any other engine or train coming along there any minute?

A. Yes sir.

Q. You knew that too?

A. Yes sir.

Q. You knew that from the north sand house, as a matter of fact, that from the sand house clear down to this cinder pit the path had been shovelled off east of the track prior to this accident?

A. Yes.

Q. Do you remember who shovelled that path?

A. Why, the section men I suppose.

Q. Didn't Mr. Rock shovel it off?

A. I don't remember.

Q. Do you remember of there having been quite a little snow quite a while before this accident?

A. Yes sir.

Q. How long had that condition existed before the accident?

A. I don't remember.

Q. You couldn't say?

A. No sir.

Q. Do you know what the over hang of a class "R" engine is?

A. The tank is two feet three inches; the distance between the outside of the studs and that wall on the outer edge of the widest part of the engine is 17 inches,—17 or 18 inches.

Q. You don't mean to say that you had gone down on the west side of the rail of that track in the winter when there was snow and ice in there through that 17 inch space at times when an engine might be coming along there do you?

A. Yes sir.

Q. You have done that voluntarily?

A. I have walked along that track when there were engines standing there at the blow off box between that track and the sheds.

Q. When there was an engine standing on the track?

A. When there was an engine standing on the north end of the blow off box.

Q. You could have gone on the west side?

A. Yes sir.

Q. Why did you do that rather than go on the east side?

A. I considered it safer.

Q. Why?

A. Because on the east side there is just that wall there and
148 the engine would stand probably clear to the north end of the pit.

Q. So then when the engine was down there and occupying the space between the depressed track and the shed just north of the end of the cinder pit you would then prefer to go between the west rail and the sheds.

A. Yes sir.

Q. But when there was no engine on the track and your way was clear you don't mean to say you or anyone else would prefer that narrow space when there was plenty of space there on the east side?

A. If there was snow there on both sides after a snow storm—when the snow wasn't shovelled or tramped down there I walked between the rails.

Q. When it was so you could walk on the east track; you don't mean to say a man would walk along in this snow and icy place between this west rail and the shed?

Objected to the form of the question.

Q. When the east side of that track was so it was shoveled or tramped down so you could walk on it wasn't the west side equally the same way?

A. It was, yes.

Q. Why?

A. If they shoveled one side they would shovel the other.

Q. Is that so?

A. I think it is, yes.

Q. You don't know of anybody that ever shoveled a path between that west rail and the shed?

A. I know the section men did.

Q. Between the outside of the rail and the end of the tie?

A. Yes sir.

Q. That is the west side of the track?

A. Yes sir.

Q. And the path they would shovel would be on the east side of the track?

A. No sir.

Q. Do you mean to say that the section men shoveled a path east of that track for men to walk along?

A. No sir.

Q. Just merely cleared it up in the performance of their duty?

A. Yes sir.

Q. But there would be snow banked up when you got to the end of the rails?

A. After a storm.

Q. Then the steam from the engine would sort of freeze
149 that into ice and make it rough?

A. No, I never saw that portion of the track that was used all the time to be allowed to be three inches; it would be tramped down.

Q. Would they do that when steam was over the cinder pit?

A. Yes.

Q. It is quite a common occurrence to have steam over the cinder pit?

A. When the cinder pit ain't shoveled out, there is always steam.

Q. As a general thing?

A. As a general thing it is shoveled out or cleaned out after an engine is brought in but there are times when I dispatched four or five engines or six or eight and they won't have much time to do any shoveling until these engines are finished up and this pile that accumulates there is shoveled into the cars.

Q. You can't say how long before the accident there had been a snow storm?

A. No sir.

Q. You can't say whether the path had been shovelled along the east side of the rail road track?

A. It was tramped down.

Q. I mean on the east side where you come down from the round house?

A. It was tramped down at the time.

Q. It was tramped down between the north end of the shed and the shanty?

A. Yes sir.

Q. And down to the blow off box?

A. Yes sir.

Q. And further south than that it was not?

A. No, I don't think it was.

Q. You don't know?

A. No.

Q. How deep was that snow east of the track and south of the blow off box?

A. I couldn't say as to the depth of the snow. I know there was a good amount of snow had fallen about that time of the year.

Q. Six or eight inches would you say?

A. Probably.

Q. When you got down there to the cinder pit where did you see Krieski?

A. I saw him at the pit.

Q. Where he had the hose in his hands?

A. Yes sir.

Q. He was pouring water on those cinders?

A. Yes sir.

Q. There hadn't been an engine dumped any coal or cinders in there for something over two hours?

A. No sir.

150 Q. Was there much fire there that time?

A. Yes, there was fire there still.

Q. After he had been pouring water on there all that time?

A. Yes, fire there still.

Q. Where was this fire when you went down to the cinder pit?

A. A little bit north of him; it seemed a little bit on the other side of where he had the hose.

Q. The fire and smoke was coming from the first, second, third and fourth sections of the cinder pit?

A. It seemed coming from the south.

Q. How far south of that?

A. I didn't go clear down to the south end to find out how far the cinders projected down there,—there was more or less through there.

Q. How high did you see that smoke? How high from the ground?

A. About the height of the coal shed—the lower part.

Q. About how high would that be?

A. I would call it 12 feet.

Q. Could it have been eight feet?

A. I think higher.

Q. You think it was higher than ten feet?

A. Yes sir.

Q. Didn't you testify in your examination before Mr. Ogden that it was only eight or ten feet high?

A. I don't remember.

Q. At the north end of the cinder pit?

A. I think I testified it was as high as the roof of the lower part of the coal shed.

Q. Was this question asked you? "Q. After the water was put on how high was the steam up at the north end? A. Come up I should judge eight or ten feet." Then I came back so there would not be any misunderstanding with this question: "Q. That cinder pit is about 80 feet long? A. Yes, about that. Q. How much of that 80 feet was on fire so as to throw up any considerable amount of smoke and steam? A. Most all. Q. After the water was put on how high was the steam? A. Up at the north end come up I should judge eight or ten feet."

Q. Now how high was that steam and smoke at the north end of the pit?

A. To the best of my knowledge, I am guessing at it, I didn't measure it, I will put it from eight to twelve feet.

151 Q. You claim that this smoke extended clear down to the water tank?

A. More or less but not as thick as at the south end.

Q. Did you go down close to where Krieska was when he was turning that water on?

A. I was up probably four feet from him.

Q. Have any talk with him?

A. No sir.

Q. You didn't speak to him at all?

A. No sir, I looked at him. He had hold of the hose putting water on and I turned around and went back to the shanty.

Q. Were you close enough to see him?

A. Yes sir.

Q. Were you so close that the smoke and steam enveloped you so you couldn't see who it was?

A. No, he was standing out quite a little ways by himself.

Q. How far out?

A. I should judge to the outside edge of the wall about.

Q. Wasn't steam bulging out from the side of the cinder pit to the west?

A. It was put there probably four feet or something like that.

Q. Was it around him so it enveloped him so you couldn't see him?

A. His back I could see and there was a pipe—a long pipe that you can stand back and pour the water on.

Q. How far did you stay to the west of the stone wall of the cinder pit as you stood there watching him?

A. I stood about probably from four to five feet off.

Q. I understand you stood over just a minute and decided to go your shanty?

A. Yes sir.

Q. And you walked up to the north end of the cinder pit between the end of the cinder pit and the south east corner of the coal shed?

A. Yes.

Q. That extension includes or crosses at an angle of about 45 degrees?

A. I don't know what the angle would be.

Q. You passed right north somewhere between 67 and 69 feet between the west rail and the coal shed until you got about opposite your shanty? ?

A. Yes sir.

Q. I suppose you were listening for an engine coming through there all the time you were passing that distance?

A. When I got between the shed and the rail I was listening.

Q. That is when you got right about opposite your shanty and on the way down?

A. I was looking out all the ways. When I got about 152 where I wanted to cross I stopped and listened.

Q. You listened all the way up? Is that right?

A. Yes sir.

Q. That is about 69 feet north of the cinder pit?

A. Yes sir.

Q. When you got at that point you stopped and listened for fear something might come along?

A. Yes sir.

Q. You stopped and listened before you raised your right leg to step over the rail?

A. Yes sir.

Q. How far were you then standing west of the rail?

A. I was standing with my back almost to the shed; I was standing between two of these standards—I stopped and my right shoulder was inside of one of these standards.

Q. And you stopped there and listened?

A. Yes sir.

Q. How long did you listen.

A. Probably five or six seconds.

Q. You couldn't hear anything?

A. No sir.

Q. Then you raised your leg to step on over the rail?

A. Yes sir.

Q. And just at that minute you were struck?

A. Yes sir.

Q. That was one step from where you stood until you got to the rail?

A. I didn't make the step.

Q. From where you stood and listened you didn't put your foot to the ground for any other step and didn't take the step and didn't try to take the step?

A. No sir.

Q. You went all the way up that 69 feet through the steam and smoke?

A. Yes sir.

Q. Couldn't see your hand before your face?

A. No sir.

Q. As you stood there you listened those two or three seconds and this engine must have been within a few feet from you?

A. I don't know.

Q. If it wasn't coming in faster than 10 miles an hour it wouldn't be far from you?

A. It was that far I couldn't hear it.

Q. A second's time would leave it only 14 feet; two seconds 28 feet coming ten miles an hour?

A. Yes.

Q. Now, as you stood there and listened this calm, bright morning, couldn't you hear that 150 ton engine coming over the west rail just a little ways from you?

A. No sir, if I could I would not try to make that step.

153 Q. And you felt shaking to- of the ground?

A. No sir.

Q. There was no engine bell to distract your attention?

A. No sir.

Q. No noise except this little drizzle of the water on the coal some 70 or 80 feet away?

A. No sir.

Q. Nothing about that to obstruct your hearing?

A. No sir.

Q. You wouldn't hear the relief valve of the engine?

A. No sir.

Q. Couldn't hear the puff of the valve?

A. No sir.

Q. Absolute silence?

A. Yes sir.

Q. You could hear that water dropping on the coals?

A. Yes sir.

Q. Distinctly?

A. Not very.

Q. You could hear it so as to distinguish it?

A. Yes.

Q. Didn't sound like the relief valve of an engine?

A. No sir.

Q. If it had you wouldn't have taken your chances and stepped?

A. No.

Q. It sounded like pouring water on fire?

A. Yes sir.

Q. It was the continuous noise of that water falling on the coal?

A. Yes.

Q. You didn't think that was the relief valve of an engine did you?

A. Why, it sounded like it to a certain extent.

Q. Heard a sound like the relief valve of an engine and you still stopped on the track?

A. Yes, but I made up my mind I couldn't hear anything else.

Q. You thought it might be the relief valve of an engine?

A. Yes, but I was satisfied hearing no bell and hearing no engine that it was the water that the man was putting on the fire.

Q. You guessed that was what it was?

A. In my judgment.

Q. And notwithstanding you knew you couldn't see your hand opposite your face you took your chances and stepped right in front on the engine, is that right?

A. Yes sir.

Q. You thought possibly an engine might come in there at that time didn't you?

A. Yes sir.

Q. The reason why you didn't walk between the rails was because you were afraid you might get hurt?

A. Yes sir.

Q. Thought you would take your chances and walk in this
154 17 inch space on the side?

A. Yes, I considered it safer.

Q. When you started and went north from the cinder pit you made up your mind to go all this distance up through that smoke and steam?

A. Yes sir.

Q. You had been down there and knew about how far you would have to go?

A. Yes sir.

Q. You knew that in passing across that track it wasn't absolutely safe to rely on the ringing of the bell didn't you?

A. Yes sir.

Q. It wasn't in this case where you couldn't see anything?

A. No sir.

Q. You knew did you that engines sometimes went by there without ringing the bell?

A. Yes sir, on very rare occasions they do. I have seen engines go by and not ring a bell.

Q. You knew it wasn't safe should an engine go by without ringing the bell for your own protection?

A. Yes sir.

Q. When you started after leaving the man there at the cinder pit, I believe you told Mr. Martin you didn't look south at that point to see if an engine was coming? That is what you told him isn't it?

A. Yes sir.

Q. And the reason as I understand was that you didn't intend to walk up the center of the track and you didn't think it necessary?

A. It wasn't my intention when I started.

Q. From where the man was you didn't intend to walk up the center?

A. That idea didn't come to me at all.

Q. Then you knew by going in that path west of the rail there was steam and that it was a dangerous place didn't you?

A. It was a dangerous place on account of the steam.

Q. You are familiar from your experience with engines with the running of an engine?

A. Yes sir.

Q. And of the various sounds that an engine makes?

A. Yes sir.

Q. On a clear morning if there is not another engine to confuse the sounds you can hear an engine coming in a block can't you easily?

A. You can hear the bell.

155 Q. No, leaving out the bell?

A. I can hear the engine coming along a block? No sir.

Q. Not if you were listening? A block is about 300 feet?

A. I don't know just exactly.

Q. The average block is about 300 feet?

A. I know what a block is but I don't know how many feet.

Q. Did you say you could hear an engine a block when the bell isn't ringing?

A. No, I don't think you would hear it if you had your back turned.

Q. If you had your side turned and were listening to it couldn't you hear it?

A. If the bell wasn't ringing I don't know whether you could or not. I never tried that that I know of—never tested it.

Q. As I understand it you were coming back of the shanty simply to wait for that purpose until another engine came along?

A. Yes sir.

Witness excused for the purpose of calling Dr. Connell.

156 Dr. J. P. CONNELL, being first duly sworn, testified for and on behalf of the plaintiff, as follows:

Direct examination by Att'y P. H. MARTIN:

Q. Where do you live, doctor?

A. Fond du Lac, Wisconsin.

Q. Are you a duly licensed and practicing physician and surgeon?

A. I am.

Q. How many year's practice?

A. 25 years.

Q. In your city?

A. Yes sir.

Q. What school are you a graduate from?

A. Northwestern University of Chicago.

Q. Do you know Mr. Gray, the plaintiff in this case?

A. I do.

Q. Have you had occasion to examine him?

A. Yes sir.

Q. When did you first examine him?

A. I think it was about a year ago. I didn't make any note of it; some time about that.

Q. That was the first examination?

A. Yes sir.

Q. When did you again examine him, if at all?

A. In May of this year; 7th or 8th of May I think.

Q. How thorough an examination did you make of him?

A. I just had him take off his shirt and underclothing and went over him fairly thoroughly as I do with most of the work of that kind.

Q. What did you find in his condition with reference to his left arm and shoulder?

A. On the first examination I found that he didn't have very much use of his left arm; there were numerous scars on him on his face and other places—I don't just recollect where they were. The muscles were atrophied or in other words there was a shrinkage of the muscles of the shoulder; the deltoid and supra spinatus and infra spinatus muscles; those three in particular were atrophied at that time.

Q. What did you observe in reference to the movements of the left arm?

A. He was able to lift his arm only a little ways at that time.

Q. What movement in particular do you mean?

A. Throw the arm up and down and at right angles. He was able to swing his arm but not to raise it out this way. (Out
157 straight at the side).

Q. Did he have the full swing of the arm this way?

A. So far as I recollect I think he had.

Q. What was the cause of that limitation of movement?

A. So far as I know he had some injury to the nerve or any other of these nerves possibly the plexus of nerves that are back of the axilla or armpit.

Q. In your opinion state whether or not the injury to his arm and shoulder is of a permanent nature?

A. As a rule injuries to these nerves of the neck, particularly those that feed the deltoid, as a rule are permanent.

Q. Did you observe the scalp wounds on the forehead?

A. I saw them but I paid but little attention to them.

Q. You noticed the discoloration?

A. I did.

Q. State whether or not that is permanent?

A. I think so, yes.

Q. Did you examine his lungs?

A. I examined his lungs the last time that he came to me. That was the last May of this year.

Q. Did he complain of having had hemorrhage?

Objected to as incompetent. Overruled. Exception.

Q. Did he complain of hemorrhage at that time and night sweats?

A. I don't recollect that.

Q. What did you find when you examined his lungs?

A. I found that he had evidence of tuberculosis and we got his sputum and found tuberculosis germs.

Q. Which lung, do you remember?

A. I don't recollect now; I rather think he has that in both.

Q. What was the nature of the examination you made?

A. To ascertain the condition of the lungs. As I *saw* before I stripped him; I practiced percussion on his lungs.

Q. Tell the jury how you make an examination by percussion?

A. By going over the various parts of the organs for the tone and sound that we can detect; then of course we listen with an instrument—a stethoscope to hear if there was any constriction; 158 this seemed to be sufficient to me to justify an examination of the sputum.

Q. Do you mean to say that that test or examination you just mentioned arose your suspicion so you felt it necessary to examine the sputum?

A. Yes sir.

Q. And on examining the sputum you found that?

A. The germ of tuberculosis.

Q. You mean to say tuberculosis is that is commonly called consumption?

A. They are identical, the two terms.

Cross-examination by Att'y SMART:

Q. What nerve is this that you say was injured in the shoulder?

A. Well, the nerves that supply the deltoid—most likely the first plexus nerve coming out of the brachial plexus.

Q. How would you suppose that would be injured by a blow on the shoulder? A. What injury would you expect to find to that nerve?

A. I don't know how it was injured; the fact of it is it was there. I don't know what it is; I can't say.

Q. You cannot tell the extent or the character of that injury to that nerve?

A. I only know this—that that nerve supplies the deltoid and the measurement of the arm showed that there was atrophy and later I also measured it again and the atrophy still continued. Now, whether that nerve was destroyed from a stroke or whether it was destroyed from inflammation of the sheath of the nerve, I don't know and I don't know whether anybody else does; but the fact is it is destroyed.

Q. You mean at the present time it is useless?

A. It is functionless.

Q. The nerve might by electricity or electric shock be put out of use for a year or so and still come back?

A. I don't know anything about that.

Q. Haven't you known of a number of cases where there has been an injury or paralysis of the arm by electricity during
159 which time the arm would be entirely paralyzed and then get the use of it back?

A. I don't recollect.

Q. But you wouldn't say that wasn't true?

A. I have no object in saying that.

Q. How many cases of injuries of this kind to the flexor nerve have you had?

A. I don't think very many; I don't recollect.

Q. The question is as to whether or not that nerve has lost its function or will it ever be restored to its function—by treating it and taking care of it at this moment could that be done?

A. In all probability when a nerve has been out of use for a year or so, in all probability it isn't going to functionate again unless there is something done to it to make it functionate.

Q. And without keeping up treatment you cannot tell?

A. There would be no treatment that I am aware of unless it is grafting a live nerve into there.

Q. What would that do where a nerve has been put out of commission?

A. In the face, in the facial nerves when paralyzed they sometimes graft in a live nerve into the one that loses the function and we get the same good results.

Q. What do they use massage for on these nerve injuries?

A. Personally I haven't used it very much; but I presume that is to increase the supply of blood and consequently bring some nutrition to it which it might not get otherwise.

Q. You say that you never had any cases of injury to the plexus nerves?

A. I said I didn't recollect having very many. They don't happen very often.

Q. Then, doctor, your opinion on unseen conditions of the body and also what will happen is based upon reading and authorities?

A. No, my knowledge is not confined to that nerve alone. I have treated a great many others; I have made a through study of it and their nature, both muscular and spiral and these
160 others ramify to this same nervous cord, and that is in a space that is frequently injured both by work and traumatism.

Q. Do you mean to say that an injury like you assume this to be is not recoverable at all?

A. I do think it very serious.

Q. You don't know?

A. No.

Q. Where is this deltoid muscle, this one put out of business?

- A. That is the muscle at the top of the shoulder joint.
- Q. What movement of the arm does it make?
- A. It lifts the arm.
- Q. Does that lift the muscle right at the top of the shoulder?
- A. Yes, sir.
- Q. If there is considerable pain in that nerve you have mentioned would you think that nerve still alive?
- A. I would think it was alive.
- Q. You wouldn't think it was beyond hope?
- A. If there was pain in it that would tend to show there was still some life.
- Q. That would make the case much more hopeful?
- A. Yes if the nerve injured had pain there. There would be no pain to a nerve if dead.
- Q. If there was an injured nerve what would it mean by finding pain in that location?
- A. When a nerve is injured or destroyed there would be no pain so far as that nerve is concerned.
- Q. You wouldn't be able to find any pain resulting from an injury resulting from any other cause there would you? For instance, if the nerve is destroyed the muscle would be useless.
- A. If a nerve is destroyed the muscle is practically useless.
- Q. Is this nerve a motory nerve?
- A. That is what we call a mixed nerve both motory and sensory, a fibrous nerve.
- Q. If the nerve was destroyed you wouldn't expect to have those functions?
- A. In all probability, no.
- Q. If one was gone you would expect the other to be?
- A. Yes, I would.
- Q. If there is pain at any time in the deltoid muscle it would indicate to your mind that at least that the sensory part of the nerve which is functioning is still in existence?
- A. As you understand there are other nerves that supply
161 some sensation to that region as well. That is not the only one that passes to the cutaneous surface.
- Q. In other words there is no place on his arm where the sensations of the sensory nerve to the surface are intact?
- A. I didn't test that.
- Q. Nothing to make you think they weren't?
- A. Nothing to make me test it. They furnish sensation to the exterior of the arm—the skin. All I tested him for was atrophy of the muscle; I would probably have to make an electrical test for that and I didn't, when I made this test, know I was going to serve on this case, otherwise I would be prepared on that point.
- Q. You cannot test without your instruments?
- A. That would be the most accurate; in other words I would pass for a talking say so if — did.
- Q. On this question of consumption just tell us what you found on percussion of the lungs?
- A. I don't recollect now all the things I found.

- Q. Did you keep notes or a record of the case?
 A. No, I didn't.
- Q. You didn't keep any record of this examination last May at all.
 A. I just kept a record that I made the examination.
- Q. That is the time you examined the lungs?
 A. Yes sir.
- Q. Where?
 A. At Fond du Lac, that is he came there to my office.
- Q. Mr. Gray furnished you a sample of his sputum?
 A. Yes.
- Q. Right there in your presence?
 A. Yes, I had him spit in a bottle in the office and we examined right in the office there.
- Q. Didn't you send it away for examination?
 A. No, we do it ourselves.
- Q. Who was with you?
 A. Dr. Calvary and the nurse and myself. We have a laboratory and it is done in the laboratory and I saw the test myself.
- Q. That is, after it was prepared on a slide and put under the microscope you saw it yourself?
 A. Yes.
- Q. You didn't do the preparing yourself?
 A. I didn't.
- Q. You turned it over to some one else?
 A. I turned it over to Miss Carew—
- Q. How long after that was the prepared slide handed to you?
 162 A. It usually takes about 20 minutes.
- Q. What stage of development of tuberculosis did you find?
 A. We cannot tell; we don't know anything about the stage we find it in, all we can tell by the slide is the amount of germs in it, in looking over the field, that is what we call it, through the microscope.
- Q. How many to a field would you call an advanced stage?
 A. If I find 200 germs in one field I consider that an advanced stage and incurable; if I find eight to ten or one or two when I look through a microscope I find that that is not a very advanced stage, of course it is altogether possible; the only thing the microscope reveals is that it is tuberculosis.
- Q. Aren't these germs in the system of a healthy person at all times?
 A. I don't know if there are any healthy people.
- Q. So-called healthy people?
 A. Yes, at a certain age I guess most people are tubercular. I say most at certain ages; the age you and I are at are more apt for men to have tubercular trouble.
- Q. You say at the age you and I are at. How do you figure me in that age? What age?
 A. I am not giving you my personal experience; but I will tell you the experience of those who have made a study of it like at the

hospital of Zurich where there are some 500 patients with different diseases and about 80% or 90% of is tubercular; and over 45 to 50 years practically 80% to 90% have tuberculosis in some form.

Q. Is that true where they get over 40 to 45?

A. Yes, below that less, of course. When you get to the age of 50 or 60 years it is practically 100 per cent that there is some tubercular trouble somewhere in the body, that is the result of thorough microscopic and macroscopic *and macroscopic* investigation.

Q. And that was practically the only examination by the microscope you could make?

A. No, not that I could make.

Q. Did you examine the expectoration by the use of the microscope?

A. Yes, and other means.

163 Q. The question is whether or not consumption develops dangerous fatal maladies depends on many different things does it not?

A. Surely.

Q. For instance, if a man develops a hard cold settling on the lungs might that develop a type of consumption?

A. That would develop the pulmonary type.

Q. Some other causes might develop tuberculosis somewhere else?

A. Yes sir.

Q. For instance the different glands of the body?

A. Yes.

Q. Or in the bones of the body?

A. Yes.

Q. It might be pretty difficult to tell what it might be that precipitated that tendency for the germ during that period of health?

A. We don't know. The tubercular trouble is somewhere in the body. We get it somewhere. Now, if you want to know what causes that to go from a latent to an active condition, that is merely a question. Anything that will deteriorate the general health of an individual will give the germ a chance to develop. Anything that destroys the amount of resistance, from cold, over exertion, over work,

Q. Age?

A. Age of course has something to do with it, and those things that give a morbid process a chance to go on.

Q. Would you say liquor?

A. That would help it along.

Q. Might start it?

A. It wouldn't start it but it wouldn't help it.

Q. It might precipitate it?

A. It might do that.

Q. If it got a start from any of these things it would take treatment to stop it?

A. Might be able to stop it by treatment.

Q. It at least requires treatment?

A. Yes sir. I would like to change that word treatment because it would have to deal with sanitary and hygienic surroundings.

Redirect by Att'y P. H. MARTIN:

Q. Doctor, I suppose a violent blow, such as being struck by a railroad engine, causing several wounds on the head and body, having several ribs broken would lower the vitality by morbid process?

164 A. I think that would have that tendency.

Q. A blow on the chest might precipitate a tuberculosis of the lungs?

A. I don't think any more than a blow anywhere else.

Q. That is if the effect of the blow lowered the vitality?

A. Yes, that would.

Q. In reference to the pain in this region where you say the nerve is not functioning is that the only nerve that supplies sensation there?

A. No.

Q. In other words there might be pain from a lot of other sources?

A. I have stated that there were more sensory nerves below the cuticle.

Q. If a man is able to lift his arm about this way although not able to raise it at right angles, does that indication show the use of some particular nerve or are there other nerves that supply that muscle which would enable him to have the partial use of it?

A. There are some other muscles that act in this case which would cause him to have some use — the pectoral and the serratus magnus, they give him this side motion, but there is an absence of use of this particular muscle.

Q. At the present time he appears to be able to lift his arm about one foot from his body and no further, what would that indicate?

A. That would indicate that that muscle that should lift his arm is not functioning and is destroyed.

Q. And the fact that he can bring it out about a foot from his body is accomplished by other results?

A. In raising his arm he throws his body and that brings some of his other muscles into action that bring it out.

Recross-examination by Atty. EDW. SMART:

Q. Did you examine only one specimen of his sputum?

A. That is all I recollect.

Q. Did you make an examination of the temperature in connection with that?

A. I think I did; I know I did; but I don't recollect how high it was.

Q. Did you make a record of the examination of the pulse?

165 A. I didn't. I would say this, though, that we don't as a rule put a great deal of stress on pulse and temperature as a positive evidence that there is something the matter; that is pronounced sometimes by the absence of the germ. If I didn't find the germ I would pronounce it a case of tuberculosis; I found all other evidence present.

Q. Do you recall how many germs were in a field?

A. In that field I think I recollect that I saw eight or ten.

Q. Would you call that an advanced stage?

A. Not in that specimen.

Q. Did you make an examination of Mr. Gray's general condition of health?

A. I did at that time. I took his pulse and temperature.

By Att'y H. P. MARTIN:

Q. Are night sweats and hemorrhage indications of tuberculosis?

A. They may or may not be.

Q. Do they accompany it?

A. Yes, but you can get night sweats and hemorrhage with other trouble but when we find the germ we know positively it is tubercular trouble. Any one who is run down from over work is liable to have night sweats. You can have night sweats from various causes other than tuberculosis.

Q. Simple causes?

A. Not simple; they are worth looking after, when you get night sweats; might get them in purulent bronchitis but that would not be accompanied by the tubercular bacilli.

By Att'y SMART:

Q. Suppose you took another sample of the sputum would you find a greater or less number of germs?

A. The next time you would probably find more. When we get that many that is all we care practically about.

166 Dr. A. H. LEVINGS, being first duly sworn, testified for and on behalf of the plaintiff, as follows:

Direct examination by Att'y P. H. MARTIN:

Q. Dr. Levings you are a duly licensed and practicing physician and surgeon living in this state?

A. Yes sir.

Q. How many years practicing?

A. Practically 35 years.

Q. Now located in Milwaukee?

A. Yes sir.

Q. Formerly lived here in this city?

A. Yes sir.

Q. Did you recently make an examination of the plaintiff, Mr. Gray, in this case, to ascertain his condition?

A. Yes sir.

Q. How recent did you make that?

A. In July 5th, 7th and 12th.

Q. Of this year?

A. Yes sir.

Q. Of this month?

A. Yes sir.

Q. Will you go on and state in your own way what you found?

A. I first examined his shoulder. I had him strip and examine his chest. My measurements, my electrical test, I found the left arm

and shoulder about one half inch smaller than the right, and the left deltoid very much shrunken. The electrical test showed that the nerve was atrophied had gone out of action practically. He couldn't raise his arm; there were some other muscles perhaps that were slightly defective; this deltoid is almost completely paralyzed. Then I examined his chest and his right lung is dry. On percussion the entire extent is crackly, rattles. Then I took some of his sputum or a sample of it was handed to me—I look it to the hospital and quite a large number of tubercular bacilla were found so there is no doubt but what the man is tubercular or has consumption in the right lung; and this left deltoid is completely paralyzed and has gone out of use. He can't raise his arm; he can raise it a little ways from his side but he cannot raise it at right angles; if he
 167 does and lets go of it it will go down immediately; he can't hold it there.

Q. What, in your opinion, would you say with reference to the permanency of that injury to the deltoid muscles?

A. I would say it is absolutely permanent; there is a permanent lesion.

Q. What other muscles did you find effected?

A. The supraspinatus, infraspinatus and teres minor.

Q. What movements, do these control?

A. The first two help to pull the shoulder up and the deltoid and others help drag it backwards.

Q. The plaintiff complains of numbness in that arm?

A. Probably caused by some function.

Q. Will that arm ever be any better in your opinion?

A. No sir, it will not.

Q. Any other muscles effected?

A. I don't think so unless very slightly. Where one muscle is completely paralyzed the adjacent muscles sometimes and their functions are effected because they are not used so much.

Q. Solely the relation between them?

A. Yes sir.

Q. You found the measurements of the left arm in the places you measured were smaller than the right?

A. Yes sir.

Q. If a man is left handed you would expect to find his left arm muscles larger than the right?

A. The muscles that are used most are the largest muscles.

Q. So, in your opinion the atrophy of the arm resulted from the injury?

A. I didn't say that. I presumed from the history of the case, taking his history as true, that would be my belief that the atrophy resulted from an injury.

Q. You mean by atrophy a withering away?

A. Shrinking, wasting, shrivelling.

168 Cross-examination by Att'y EDW. SMART:

Q. Is this flexor muscle the one injured there?

A. That is the one I believe to be effected; that is the one that is effected.

Q. Does that have a combined function—motory and sensory?

A. Yes.

Q. Are both of these functions destroyed in this nerve?

A. The motory is practically completely destroyed; the sensory may be preserved slightly—but very slightly.

Q. This area of anaesthesia there in the shoulder, how does that compare with the other side. Is that sensation interfered with as well as motion?

A. This region of anaesthesia is evidenced on examination of the skin on the outside.

Q. With a loss of function in this nerve I suppose there is some loss of sensation?

A. That is not necessary.

Q. You wouldn't expect to find there was pain from this nerve?

A. That is a question that I think has been explained; perhaps you didn't understand. If you have a nerve here (indicating) and cut it in the middle and the distal part of your nerve becomes inflamed, the patient will feel pain in the area destroyed; the pain will radiate over that area and the man will have pain for perhaps a long time. I have seen this myself. If a foot is amputated the patient will have pain in the great toe, feel it through the entire length of the foot.

Q. The muscle surrounding the bone coming around from the back then is destroyed to the deltoid?

A. It is quite likely that portion in front here, beneath the deltoid is destroyed.

Q. You say that taking the history of the case you feel inclined to attribute that injury to the nerve as the result of an injury for the reason that he had before that time been struck by an engine?

A. Yes sir.

Q. That is probably the case?

A. Yes.

Q. What would be another cause.

A. The use of arsenic or intoxicants to an extreme extent; general debility; but to make myself perfectly clear, in most of these
169 cases, practically in all of them so far as my observations go, the paralysis is never confined to a single nerve, it goes out and effects perhaps one arm, both arms or both legs; so that knowing as I do know that this single nerve is implicated, and that alone, I would ascribe the condition to an injury as I say arsenic, whiskey or general debility, all these things; but knowing the man had an injury, if he hadn't I would be quite at a loss to know.

Q. When these nerves from cause become inflamed it is called neuritis?

A. Yes sir.

Q. That would come from general debility?

A. Yes.

Q. Over work?

A. Yes.

Q. Sleepless nights, anxiety?

A. Yes.

Q. You didn't examine the sputum yourself did you?

A. No, the intern- did that—the intern- at the hospital examined it.

Q. You don't know just what the count was?

A. Yes, I examined the field.

Q. After the slide was prepared?

A. After the slide was made.

Q. Can you state exactly what the number of germs were?

A. I didn't count them but there were a half dozen, eight or ten in a single field.

Dr. DONOHUE, being first duly sworn, testified for and on behalf of the plaintiff, as follows:

Direct examination by Att'y P. H. MARTIN:

Q. Where do you live, doctor?

A. At Antigo, Wisconsin.

Q. You are a duly licensed and practicing physician and surgeon in this state?

A. I am.

Q. What college were you graduated from?

A. Northwestern University, Chicago.

Q. How many years' practice?

A. I graduated in 1906.

Q. Been practising where ever since?

A. I practiced about one year and two months in Chicago.

170 Q. As interne in a hospital?

A. Yes, sir, then located at Antigo.

Q. When?

A. I went there the 7th of July, 1907.

Q. How long have you known Mr. Gray, the plaintiff in this case?

A. Since I was a little boy; ever since I was large enough to know anyone.

Q. What did you know of his apparent health prior to this injury?

A. Seemingly all right.

Q. Were you called to attend Mr. Gray after this injury on the 19th of January, 1911?

A. Yes sir.

Q. Did you treat him?

A. I did.

Q. Go on and state in your own way what you found his injury to be.

A. Well, I was called somewhere between 10:30 and 11:00, I should judge, and he was at home, and I made an examination of him; they said he was injured; I found the skin from his forehead hanging down over his face; the bone was exposed here and a cross shaped incision or cut on the back of the head right over the occiput, I should judge about two inches in length and about an inch to an inch and a half transverse; there was considerable injury done to the face; there was an incision on the right hand side of the nose,

no I believe it was the left hand side and the face had several smaller incisions; one on the bridge of the nose. The periosteum was knocked off the bone, and there were two incisions underneath the chin. Those were the principal marks that I found on him that time. About that time after I got through examining him, Dr. M. J. Donohue, my associate and assistant came in and we shaved the scalp and made all the necessary preparations for cleaning out the wounds and fixing him up. After the preparation of the patient we examined the wounds to see that there was no broken bones or fractures to the skull and there was a fracture of the outer part of the skull and a cut over the occiput, otherwise there was no fracture of any of the bones, with the exception of the bone or the periosteum over the nose; there was no fracture there. I fixed him up
171 without an anesthetic. We put no bandage on the wounds of the head.

We bandaged the frontal area and over the occiput and put on a gauze pack; we dressed the wounds with gauze dressing and looked him over for other conditions. I should judge the different scalp wounds of the head, the best way I can describe them, were four or five inches all together and exuding serum; there was blood on the underwear. We scraped them and put on a sterilized dressing; further than that we didn't examine him because he was not in condition to talk. We didn't attempt to advise with him at all. We waited until the next day when he could tell us and locate the different pains.

Q. What do you mean by not in a condition to talk?

A. The pulse was rapid; he had a cold clammy perspiration all over; a little difficulty in breathing, and for that reason we thought an extensive examination at that time would not be the proper thing. We thought he would suffer less by making that examination later.

Q. In the latter examination what did you find?

A. The next day I think I got there about nine o'clock for the purpose of dressing him. I dressed the wounds on the head after I made a thorough examination of the body. I found a discoloration, or rather a bruise on the left shoulder; several smaller bruises across the back. A fracture of the third, fourth, fifth and sixth ribs of the left side of the sternum and the sixth rib on the right side to the axilla.

Q. Any other wounds?

A. No, that is all the evidence we found except minor bruises.

Q. You learned from the patient the way in which he claims to have sustained his injuries?

A. Well, I am not prepared to say as to that he said he was injured.

Q. You learned that he had been struck by an engine?

A. Yes sir.

Q. Have you heard his testimony here with reference to how he was struck and where?

A. I heard part of it, yes.

Q. How long did you continue to treat him, doctor?

A. I treated him at the house from January 19th to February

2nd. Then I had him come to the office for treatment until some time in April.

172 Q. Do you remember of that time giving him any opiate?

A. Yes, on the first night I did. I gave him an opiate then I think for five or six days, I am not positive. I gave him an opiate to relieve pain, the second night I think it was again or the day after the injury. He complained or evidenced pain in the region of the heart, that is where most of his pain was; it gave him no rest at all without an opiate.

Q. Did you have to insert stitches in these wounds?

A. Yes sir.

Q. Many of them?

A. Yes, several.

Q. It appears that his forehead now is marked by a ramification of black marks where the wounds had been? Are those permanent or can they be removed?

A. They are permanent.

Q. What is the cause of them?

A. It is due to the coal dust and dirt being ground into the wound so that it couldn't be taken out without cutting the skin off about the margin about a quarter of an inch. By that system you would be able to remove it.

Q. You could remove the coal dust that is there?

A. Yes.

Q. Have you examined Mr. Gray recently?

A. I have.

Q. With what results or what did you find?

A. I examined him shortly—I think about two weeks ago—I stripped him down, took off all his clothes, I noticed his breathing and expansion. I saw that he was emaciated.

Q. That is that he lost in weight?

A. Yes. I asked him if he had not got thin and he said he had. I found there were reasons for doubt and I asked him to let me have a sample of his sputum. I examined him thoroughly that afternoon and then told him to go home; he was thoroughly exhausted; I told him to use a bottle to expectorate in and bring it back to me in the morning. He did and I examined it under the microscope. I found that there were tubercular bacilli in the sputum. His pulse were 132 and his temperature $99\frac{1}{2}$.

Q. Is that normal?

A. A little bit above normal.

Q. How about the pulse?

A. The pulse was abnormal.

173 Q. Did you examine the arm?

A. I examined the arm at that time and found there was a wasting of the upper portion of the arm, that he is unable to raise the arm from the body scarcely 30 degrees from 30 to 45 degrees, unless he tilts the spine with it.

Q. What is the reason for that?

A. That is due to paralysis of the deltoid muscle.

Q. Is that permanent?

A. In my judgment it is.

Q. Are there other limitations to the movements of that left arm besides those you speak of?

A. He cannot swing the arm back and forward, there is a limited motion there.

Q. What have you observed in reference to the general condition of his health and vitality.

A. A general falling off; he has been getting thinner; he is not as steady as he was; more wabby and feeble.

Q. State whether or not such an injury as the one he did sustain would cause tuberculosis?

A. It would, yes.

Q. In what way?

A. It would decrease the resisting forces—tend to give a chance for infection and give it a chance to loom up.

Q. In other words would or can this germ that is dormant or inactive become active?

A. Yes sir.

Q. In your opinion is the tubercular condition you found the result of this injury?

A. It is.

Q. In your opinion is he permanently disabled from manual labor?

A. He is.

Q. Did you treat him with reference to bringing about a cure of the arm if possible?

A. I did.

Q. What did you do, doctor?

A. I used electricity and massage, both galvanic and theoretic.

Q. How long was that?

A. From the 21st of February to the 2nd of April.

Q. Any beneficial results?

A. Not that I observed.

174 Cross-examination by Att'y Edw. SMART:

Q. How long was Mr. Gray confined to his bed, doctor?

A. I think perhaps between 14 and 21 days.

Q. After that period did he come to your office for treatment?

A. I had him up and around the house for about a week but he wasn't strong enough to come to the office?

Q. How soon did you commence the treatment of massage and electricity of his arm?

A. The 21st of February, that is about four weeks after he was injured; of course the massage was applied before that, but the electrical appliances we have in the office and had no mode of taking it over to his home so we couldn't give the electrical treatments at the house.

Q. In what way did you give him those electrical treatments?

A. We have a battery there run by cells and we gradually gave him as much current as he could stand for a certain length of time,

then switched to the thermo to see what beneficial results we could bring about in that way.

Q. You didn't try this new method of using electricity to drive medicine right to the seat of pain—seat of the injury or inflammation?

A. No sir.

Q. Simply used general electricity?

A. Yes sir.

Q. After taking hold of both poles?

A. No.

Q. How?

A. One pole.

Q. And change it about?

A. Yes.

Q. The positive and negative.

A. Yes sir.

Q. Did that lameness there appear continuously from the time of the injury—that lameness to that nerve?

A. I think he complained of this intense pain about the second day.

Q. How long did the pain continue to be intense?

A. I think for about two weeks.

Q. After that what course did that pain take?

A. It gradually became lessened.

Q. How soon was it before the loss of the use of the arm commenced to develop?

175 A. I think perhaps about two weeks or two and a half.

Q. After that what course did that pain take?

A. It gradually became lessened.

Q. From the date of the injury?

A. Yes sir.

Q. What was the first development towards the loss of that arm?

A. When he got up and tried to put on his coat he couldn't get his arm in a position to help himself—had to throw the coat over his shoulder. As we went along we tested him right along to see if he couldn't get his arm around; if he would bring it up it would drop.

Q. You think in two weeks the paralysis of the arm commenced to appear according to your judgment?

A. Two or two and a half.

Q. Might it not be that during that period the trouble was not paralysis but due to the fact that it was painful for him to lift his arm after having received an injury?

A. That naturally would enter into that.

Q. You couldn't tell where or when the paralysis commenced to develop?

A. No, I couldn't.

Q. When did you cease giving the electricity treatments?

A. I gave the electrical treatments from the 2nd of February to the 21st of April.

Q. You didn't commence at that until he came to the office?

A. No.

Q. Is that the time you commenced the massage?

A. No, we used the massage at his home.

Q. He passed out from your treatment in April?

A. Yes sir.

Q. At that time, so far as you know, there was no claim of any trouble with the lungs?

A. No.

Q. So far as his losing weight on account of sickness was concerned during the time he was laid up there was nothing unusual in that?

A. Not that I noticed. When a patient comes to you every day you would not notice it as much as if he went away for two or three months and then came back.

Q. When he passed out from your care you didn't notice any particular falling off of weight?

A. No.

Q. Was he very nervous and irritable?

A. Yes, he was quite nervous.

176 Q. You are somewhat related to Mr. Gray are you not?

Can you tell us what relation you bear to him?

A. I don't know just what it is I know it is on my father's side somewhere.

Q. Can you tell us how close or how distant?

A. No, sir, he can probably tell that better than I can. I am some kind of a cousin—whether first, second or third I don't know.

Q. Do you know anything about the history of the family with reference to tuberculosis?

A. So far as I can be sure there has been no tuberculosis in the family.

Q. That is from hearsay?

A. I had a talk with an older brother of Mr. Gray's.

Q. From your personal knowledge you know nothing about it?

A. No.

Q. How *an* intimate an acquaintance did you have of Mr. Gray's habits and conduct and his general condition of health prior to the time of the injury?

A. I had treated the family, that is, their children, but I didn't know very much about his condition because I didn't know there was anything the matter with him.

Q. I think he testified that he had been laid off at least a week. Did you treat him during that time?

A. No, I didn't.

Q. You don't recollect what trouble he had, if any, while you were living in Antigo prior to the accident?

A. No.

Q. Were you intimately enough acquainted with him to know whether or not his habits were such as to make him liable to consumption?

A. No, I had a passing acquaintance with the man. I have seen him week in and week out and probably weeks I wouldn't.

Q. Was he a man that over worked, reducing the condition of his health that way?

A. No, I can't say that.

Q. You can't say anything else he was doing that would weaken his system?

A. No sir.

Q. You don't know whether he was drinking or not so as to do that?

A. No sir, I don't know anything about it.

Q. I suppose that in case he was drinking his system might
177 get in such condition as to have tuberculosis develop?

A. Yes.

Q. And as a man grows older his chances are better to develop tuberculosis?

A. It decreases the resistance, and anything that decreases the resistance will aid in the development of tuberculosis.

Q. What percentage of cases of tuberculosis, in your judgment, are the result of injuries?

A. What kind of tuberculosis do you mean, bone or pulmonary or general tuberculosis.

Q. Take it as a whole?

A. Take tuberculosis of the bone I should judge about 60 per cent is due to injury.

Q. That is where there is a direct injury to the bone and tuberculosis sets in at the seat of the injury?

A. Yes.

Q. That is a sort or class of disease of course where you can say there is some direct connection between the injury and the tuberculosis?

A. Yes.

Q. What per cent?

A. About six per cent I think is pulmonary.

Q. What did you understand my last question to be?

A. I understood your last question to be pulmonary consumption of the lungs.

Q. Tuberculosis of the bone is sometimes directly connected with an injury you say?

A. Yes.

Q. That accounts for the large percentage of tuberculosis cases arising from injuries?

A. Yes.

Q. You say that is about sixty per cent?

A. I should judge.

Q. But pulmonary tuberculosis doesn't show over six per cent?

A. About.

Q. Are you taking the entire field of tuberculosis cases altogether?

A. No, I can't judge if I should generalize; but by taking them all and shuffling them up I would say about 20 per cent.

Q. Taking the connection between pulmonary consumption and injuries is that a smaller percentage compared to injuries?

A. If I put them all together I would say about 20 per cent bone tuberculosis or about one-fifth.

Q. That is out of a hundred?

A. Yes sir.

Q. In your experience what is the average or ordinary
178 age when tuberculosis appears from causes other than injuries?

A. From about the age of twelve or puberty, until about the age of twenty-eight.

Q. You don't agree with Dr. Connell?

A. I don't agree with anybody. I have my own statistics; I have a chart of my own and my own statistics.

Q. That is based simply on your own experience?

A. Yes.

Q. What about the tendency to tuberculosis in a man of 40 to 50 years?

A. The age of developing tuberculosis is not that time.

Q. You heard Dr. Connell's testimony?

A. Yes sir.

Q. You disagree with his authority?

A. Yes, I do in that respect.

Q. He seems to have based his authority on some very eminent European authority?

A. Yes, I think he did.

Q. Are you familiar with that school of thought?

A. I don't know. Probably I have read the same authority. There are different authorities on everything you know.

Q. Then there is some difference about that?

A. Yes, that is a subject of discussion now. In so far as a general debility or breaking down of the system goes, when a man becomes broken down, in so far as that will actually result in weakening the system and giving an opportunity for the germ to thrive I would agree with him.

Q. As I understand these germs are about all of us at all times?

A. Yes sir.

Q. May be taken in through the mouth, nose or lungs?

A. Yes, particularly the mouth.

Q. They may be taken in, become lodged in there and stay there for some time?

A. Yes.

Q. Or they may become active and go right ahead and develop the regular type of tuberculosis?

A. Yes sir.

Q. What is your theory of developing tuberculosis from 12 to 28 years rather than from 40 to 50 years?

A. I don't know, except that that test, if a question of
179 theory, compares with my statistics.

Q. In what way?

A. Take for instance a girl when coming to womanhood, the discharge of blood she loses must be rebuilt every month; that naturally decreases the resisting forces. Most of my cases at the present are of young girls from twelve to twenty. That is when the trouble becomes known. That is so, now, whether a theory or not I don't know.

Q. That is what you base your opinion on?

A. That is where most of my cases are at the present time.

Q. How many cases of tuberculosis have you had?

A. As near as I could say practically 250.

Q. How many of them found in young women of that kind you have mentioned?

A. Nearly all.

180 STATE OF WISCONSIN,
County of Outagamie:

In Municipal Court for said County.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Appearances:

For the Plaintiff: S. J. McMahon of record and P. H. Martin of Counsel.

For the defendant: Edward M. Smart.

Dr. G. G. BELLIS, being first duly sworn, testified for and on behalf of the plaintiff, as follows:

Direct examination by Att'y P. H. MARTIN:

Q. You are I suppose a duly licensed and practicing physician and surgeon in the state of Wisconsin?

A. I am.

Q. Graduate of what school.

A. Detroit College of Medicine.

Q. How many years practicing?

A. Since 1903—nine years?

Q. Are you a specialist in any branch of medicine?

A. I am.

Q. What branch?

A. Tuberculosis.

Q. What time have you been engaged in special work?

A. A period of five years.

Q. Where are you located at present?

A. At the State sanatorium at Wales, Wisconsin.

181 Q. Have you examined the plaintiff in this case?

A. I have not.

Q. You heard Mr. Gray's testimony in reference to the way in which he was injured?

A. I did.

Q. It is claimed that Mr. Gray has tuberculosis. What I wish to get at is whether or not an injury such as you heard Mr. Gray has sustained is likely to produce or cause tuberculosis?

A. It is.

Q. In what way?

A. By reducing the natural resistance of the patient by lowering his vitality, that is, putting him in a condition whereby he is unable to withstand infection.

Q. What is hemorrhage a natural significance of, doctor?

A. I assume you mean from the lungs.

Q. Yes, is that significant symptom of pulmonary consumption or trouble?

A. It is.

Q. If you found hemorrhage from the lungs and night sweats and upon examination of the sputum you found tubercular germs, I suppose that would be fully conclusive that the patient had what we call tuberculosis or consumption?

A. It would.

Q. Doctor, will you explain to us, assuming that the patient is in average state of health, a man 50 years of age or 51, capable of doing heavy manual labor, and performing that kind of labor almost daily, and that such patient received such an injury as the plaintiff in this case did receive, how soon or how remote a time from the injury would tuberculosis develop as a consequence, or might you expect to have it manifest itself?

A. That would depend somewhat upon the natural resistance of the patient to the infection plus the amount of energy which took place at the time of the accident, and would undoubtedly vary between three months or perhaps two or three years.

Q. So that if the plaintiff in this case was injured on the 19th day of January, 1911, it wouldn't be an unusual thing to find manifestations of tuberculosis a year subsequent to that time, or later?

A. It would not.

Q. You have heard the testimony on tuberculosis by Dr
182 Levings given here today?

A. I did.

Q. And of what he found in an examination of the sputum of the plaintiff?

A. I did.

Q. And also the testimony of Dr. Connell and Dr. Donahoe?

A. I did.

Q. State whether the method of procedure to ascertain whether or not the plaintiff had tuberculosis is recognized as the best test?

A. It is.

Q. When you find these germs you are then assured of the presence of tuberculosis?

A. Yes sir.

Q. Does the location of an injury on the body have anything specially to do with the question of whether or not it will produce tuberculosis, that is, will any injury to the body, say breaking of the ribs or an injury upon the shoulder or upon the chest, be more likely to produce conditions that would be favorable later to cause consumption?

A. The chances for development of consumption after an injury is greater when the injury is upon the chest.

Cross-examination by Att'y EDW. S. SMART:

Q. What do you mean by the chest?

A. The thorax—the part surrounded by the ribs, sternum and spine.

Q. In that case you would expect for a direct result in connection with the injury wouldn't you?

A. I don't understand.

Q. If there was a direct connection between the fracture of the ribs and the development of tuberculosis you would expect the tuberculosis to appear from the very day or a week later or do you mean it would merely develop a change in the health of the patient?

A. I would have you understand that tuberculosis exists for a length of time before active unless it might be elicited by a physician.

Q. It might or might not?

A. It may or may not.

Q. In other words, when tuberculosis breaks out in open symptoms, you cannot tell whether it has been smouldering for a long time or started immediately before?

A. No, you cannot be sure of the resistance of your patient.

183 Q. You cannot be sure when it started in anyone or whether it started as a direct result of that cause?

A. No you cannot.

Q. As I understand you tuberculosis might start in very suddenly and progress very rapidly?

A. Yes sir.

Q. How would you expect, for instance, a fracture of the ribs, we will say close to the back bone, how would you expect that to lead directly to tuberculosis other than by general breakdown?

A. There might be an item of infection like the one cited of injury which might become ruptured from force of blows carrying the germ of disease to tissues which have been reduced in vitality from an injury, that is, giving it a better chance to develop.

Q. That, of course, is entirely speculative?

A. Yes, that is speculative.

Q. It might be true of a fracture or injury to any other part of the body?

A. It could possibly be true; but more likely with lung tissue.

Q. Simply because nearer the location?

A. Yes sir.

Q. As I understand it, it is the lowering of vitality which gives a chance to cultivate or develop the tubercular germ, is that the way you look at this case?

A. Yes sir.

Q. In other words, an injury is simply the making of the soil fertile?

A. Rendering the soil fertile for the growth of infection?

Q. That is the sole relation it has to effect or cause tuberculosis?

A. It is.

Q. In other words it has that same relation as in the case cited

by Dr. Donohue of the young woman just developing into womanhood and contracting tuberculosis during that period?

A. Yes, tuberculosis having been developed after puberty.

Q. Would you call that change in health of a young woman the cause of tuberculosis?

A. Contributory cause.

Q. I suppose lowering the vitality and debility from childbirth would be the same kind of contributory cause of consumption?

A. It would be contributory.

184 Q. Over exhaustion from work might be a contributory cause?

A. Yes sir.

Q. Dissipation?

A. Yes sir.

Q. Debility resulting perhaps from age?

A. No.

Q. Not as a general thing?

A. Very unusual

Q. Is age, would you say, a contributory cause, ordinarily?

A. It isn't a contributory cause.

Q. What is the prognosis in the case of a person about 51 years of age, general appearance of Mr. Gray here, where he developed tuberculosis as has been testified to here?

A. I wouldn't attempt to give a prognosis on the casual observance of a patient, even with his history.

Q. You say there is not enough information in this testimony you have heard to forecast the future?

A. There is not.

Q. In other words, about all you can tell now is if he puts himself in the proper conditions and attitude, and upon proper treatment and care of himself he might be able to overcome this trouble?

A. I couldn't state.

Q. I mean if you can tell he will be cured under those conditions?

A. I couldn't state either way.

Q. I believe you have many patients under your care and charge?

A. I have quite a number.

Q. About how many?

A. We have 170 patients at the institution.

Q. Average about that right along?

A. Yes sir.

Q. In your judgment what percentage of cases of pulmonary consumption can be attributed in the manner that you have stated to injuries?

A. Possibly five per cent.

Q. What is the most common contributory or direct cause of pulmonary consumption?

A. I think the history of reduced resistance following some acute infectious disease is the most common.

Q. Name some?

A. Pneumonia, typhoid, pleurisy, measles, scarlet fever, I think

I mentioned typhoid; I think they would be perhaps the forerunners of the largest percentage of cases that we have.

185 Q. What are the other causes or cause in a general way?
A. Pregnancy, lactation, over work, occupation which requires a person to live or work in illy ventilated shops or offices; close application to books, of course, bad habits also; in fact any occupation or any surrounding which decreases the general health of the individual.

Redirect by Att'y P. H. MARTIN:

Q. Doctor, assuming that a patient has tuberculosis what would be the proper treatment for it, and what would it cost?

A. The proper treatment would be the sanitarium at a cost of from in the state sanatoria \$10.00 a week and in private sanatoria from \$30 a week up to \$200.

Q. According to the luxury you would have?

A. Yes sir.

Q. Take a poor man who has go- to take the middle things in life, an ordinary man who is living on his daily wage, what, per week would be reasonable for such a case at a state sanatorium where treatment is cheapest?

A. \$10.00 a week.

Q. Are you able to give any idea of the length of time it might require?

A. I couldn't state.

Q. You say you are unable on the information you have to make a prognosis?

A. Yes sir

Q. You couldn't give a prognosis without considerable trouble?

A. I wouldn't want to.

Q. I suppose a case of consumption might be so far advanced that you could tell at a glance that it was in the last stages?

A. One peculiarity of tuberculosis is you cannot make a prognosis from the personal appearance of the patient.

Q. In any event it would cost \$10.00 a week to give him the proper treatment?

A. Yes sir.

Q. You don't find any of the cases yielding in much less time than a year?

A. Very seldom.

Q. What is about the average time of a case that would yield to the kind of treatment that you give at this institution?

A. Do I understand for a cure to take place? The average time would be at least three years.

186 Q. Do you mean all of that time spent in a sanatorium or spent under conditions that prevail at the sanatorium, that is same food etc.?

Q. Three years of absolute rest or nearly so?

A. Yes sir.

Q. Then you must refrain from manual labor while taking the

cure?

A. In a very large majority of cases.

Q. A man would not be permitted to do a day's labor on a railroad or farm while taking the cure?

A. No.

Q. To be absent from labor and simply devote your time to the cure itself?

A. Yes sir.

Q. And the average time would be three years you think?

A. Yes sir.

Recross by Att'y SMART:

Q. The cure for a patient today is simply to bring his vitality back?

A. Yes sir.

Q. They use some medicine to bring the vitality back?

A. Some.

Q. There is no medicine that cures consumption today?

A. No, I don't think there is any medicine that cures anything.

Q. You know of no specific medicine, is that it?

A. Yes sir.

Q. There is no specific medicine for consumption?

A. We have none.

Q. You have the anti-toxin for diphtheria as a specific that reaches directly to the seat and cures the disease?

A. Yes sir.

Q. With tuberculosis you have no such?

A. We have no such specific.

Q. And the treatment is that which looks to the vitality of the system and the strength and taking flesh, nourishing food, etc.

A. Yes.

Q. To a large degree that treatment is successful where cases have not gone beyond the first stage?

A. It is yes sir.

Q. A large amount is being spent in this way in taking care of tubercular patients today?

A. Yes sir.

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Thursday, July 16, 1912.

Mr. GRAY recalled for further cross-examination.

Q. As I understand it when you started north from the cinder pit the reason why you walked west of the track instead of between the rails was because you were afraid?

A. No sir.

Q. Isn't that the reason?

A. No sir.

Q. Why didn't you walk between the rails?

A. Because I considered the west side of the rail would be the safest way.

Q. That is what you thought?

A. I considered it safer to walk on either side of the rail.

Q. In your examination before Commissioner Ogden was this question asked you? "Q. Why didn't you walk between the rails?

A. I was afraid." Did you so testify?

A. Yes sir.

Q. That was true?

A. Yes sir.

Q. You were walking a slow walk up there were you?

A. Yes sir.

Q. What is your ordinary walk—how many miles an hour?

A. Why, I don't know as I can just exactly tell.

Q. Did you testify as follows before Commissioner Ogden? A.

"Q. How fast do you mean by an ordinary walk?

A. I was walking out four miles." Did you so testify?

A. Yes sir.

Q. Then your ordinary walk is about four miles an hour?

A. That is what I said.

Q. Is it true?

A. I couldn't say as to that because I never timed myself.

Q. How fast do you walk when you are trying to go fast?

A. I don't know the rate?

Q. Do you know that an ordinary walk is about three miles an hour?

A. No sir."

Q. You know that that is a dangerous place in there if an engine would come in on that track?

Objected to going over those questions. Overruled. Exception.

A. It was a dangerous place anywhere on either side, or in the middle of the track but I considered that that was the safest course to take.

Q. That space in there—the clearance between an engine that runs in there on that track and the clearance west of an engine to the coal shed is only about 17.20 inches?

A. Yes sir.

Q. And you testified before Commissioner Ogden? "Q. It is a dangerous place? A. Yes sir." Did you so testify?

A. Yes sir, it was at that time.

Q. And another question? "Q. It wouldn't be a safe place for a man to be in? A. No sir." Did you so testify?

A. Yes, but it is a safer place than the other side to be in.

Q. Did you so testify?

A. Yes sir.

Q. It was true wasn't it?

A. Yes sir.

Q. About this bulletin Mr. Gray. That bulletin was put there in the fall or winter of 1909?

A. I think so.

Q. It was written in lead pencil?

A. I don't know.

Q. Don't you know?

A. No sir.

Q. Don't you know whether it was a regular type written bulletin or not?

A. No sir. I couldn't say.

Q. You have seen these typewritten bulletins that are put there from time to time?

A. Yes sir.

Q. You couldn't tell whether this was one like the typewritten ones or a written one?

A. No sir.

Q. You don't know whether it had a serial number on either?

A. No sir.

Q. You know what I mean?

A. I don't know what you mean by serial.

Q. You know these bulletins are numbered in series?

A. Yes sir.

Q. If three or four bulletins came out today each one would have a number in the order in which it is issued?

A. Yes sir.

Q. You can't recall whether that order had any number on it?

A. No.

Q. You are quite positive it was signed by Mr. Armstrong?

A. To the best of my knowledge.

Q. The only thing this bulletin stated was that they were to stop those engines south of the cinder pit?

A. Yes sir.

Q. You can't remember anything more about it?

A. No sir, that was the most important to me.

Q. It didn't say anything about not stopping on the wrecker track?

A. Not to my knowledge.

189 Q. Do you mean by that that you don't remember or would you say that it didn't?

A. I don't remember.

Q. Do you remember about that time of some order or bulletin being put up there besides this one which was in relation to the wrecker switch?

A. No sir.

Q. You have no recollection of any such thing as that at all?

A. No sir.

Q. I believe you testified in your direct examination that this bulletin you referred to was put up and that some of the men observed it and some of them didn't—that is with reference to stopping south of the cinder pit?

A. Yes sir.

Q. What proportion of the men in your judgment was there that observed that and stopped south of the cinder pit?

A. Of course that would be a pretty hard thing to explain; there were times that the first man that would pull in there would stop south of the pit of course the rest couldn't pull up there—it would be blocked; then again, when the track was clear and a man would come up there he would go clear to the going out track and others

would follow him; then again a man would come in with a clear track and would stop south of the cinder pit.

Q. That was the general practice they had been following right along after that bulletin had been put up?

A. Yes sir.

Q. Do you remember who brought in those three engines that morning before you got hurt?

A. No, I don't.

Objected to as being gone over.

Q. Do you know where anyone of these three engines that came in that morning before the accident stopped?

A. I think they stopped north of the pit.

Q. You state in your complaint in this case that when you entered into this smoke to go north of the cinder pit you relied upon this bulletin and the custom and practice for the engineers not to go north of the cinder pit. Do you understand what I mean? You didn't rely on that, did you?

A. No sir, I didn't.

Q. You knew that the custom and practice wasn't observed.

A. Yes sir.

190 Q. Do you know how many switch engines or road engines would pass over that coal track on a day on an average to go to the round house and beyond that were in there for the purpose of being hostled?

A. No, I couldn't say as to that, only that when the going out track was blocked they would have to go up and down what they call the going in track.

Q. East of this sand house and east of your shanty is what is called the going out track?

A. Yes sir.

Q. That is the track that an engine in being blocked coming out of the round house and going up to the round house would go out that way?

A. They were supposed to go out there.

Q. But they would stop on that track to take their sand?

A. Yes sir.

Q. That track was also used sometimes by the cars that brought in the sand for unloading the sand in the sand house.

A. Yes sir.

Q. And cars were there bringing in and unloading slab wood, and other wood that was used for fuel and the engines would stop and unload on the outgoing track.

A. Yes sir.

Q. And also cars came in there in unloading building and bridge material?

A. Yes sir.

Q. Sometimes the track was occupied by repair also?

A. Not to my knowledge.

Q. Do you remember that they used to ballast the snow plow on that track during the winter time?

A. No sir.

Q. You have no recollection of that?

A. No sir.

Q. These engines would stop on that road for sand and water?

A. Yes sir.

Q. Do you know what was the practice of setting valves on engines?

A. Yes.

Q. Would they use that track for that purpose?

A. That and the yard.

Q. This outgoing track being occupied for all these different purposes would frequently require the use of the ingoing track for switch engines going to the round house and beyond?

A. Yes sir.

Q. Up beyond the round house there is a material shed?

A. Yes sir.

191 Q. The material cars had to be taken up through there and stopped by that shed?

A. Yes sir.

Q. The switch engine had to go up several times beyond the cinder pit to the water tank to get water?

A. Yes sir.

Q. And to get coal?

A. Yes sir.

Q. In the winter time the cars containing perishables like fruit, vegetables, butter and eggs and such stuff would have to stay in there and run up to the round house?

A. Yes sir.

Q. And they would have to go in there to get the wrecker?

A. Yes sir.

Q. And any other engine that wasn't in service they would run it up there and into the round house?

A. Yes sir.

Q. And all these different purposes required these engines to be run up there through this cinder pit?

A. Yes sir.

Q. When the other track was blocked?

A. Yes sir.

Q. And that happens from time to time or every day as necessity arises?

A. No, there were days when it didn't happen.

Q. You never could tell when it would happen?

A. No sir.

Q. When you speak about some of these men running their engines up so as to clear the outgoing track I understand by that that they wouldn't come quite far enough up to get in the way—just stayed at a point where they wouldn't be in the way for an engine going from the round house to the outgoing track?

A. Yes sir.

Q. Then they pretty generally observed the practice in stopping on the wrecker track during winter?

A. No sir.

Q. Don't you remember that after this bulletin came out that you referred to them pretty faithfully stayed away down there so as not to drop water and make ice?

A. No sir, I found lots of engines there in the winter time.

Q. Can you name any of the men who did that?

A. No sir, I can't now.

Q. About what time was it you got to your house that morning?

A. I couldn't tell you.

Q. Within fifteen minutes after you got hurt?

A. I don't know.

Q. You can't recall?

A. No, I paid no attention to it.

192 Q. You don't know where that order or bulletin is now that you have testified to?

A. I can't tell you, I don't know.

Q. You haven't seen it since you were hurt?

A. No sir, I haven't.

Q. Do you know of anybody else that has seen it or knows where it is?

A. No.

Q. When was the last time you saw that?

A. Well I remember reading it twice. I think I read it twice seems to me, and I didn't read it after that. That was some time after it was put up there. I haven't paid any attention to it since that time.

Q. When did you first go to the doctor about this hemorrhage?

A. Why I think it was in May.

Q. That was what doctor?

A. Dr. Connell.

Q. The doctor who was on the stand?

A. Yes sir.

Q. That was in May, 1912.

A. Yes sir.

Q. That was the first hemorrhage you had?

A. Yes sir.

Q. Is that about the time your night sweats commenced?

A. No, a little while after that.

Q. A little while after that?

A. No, a little while before that.

Q. Have you a knowledge of your earnings for several months previous to the accident? Do you think you would recollect whether they are about right or not if I read them?

A. I couldn't really recollect.

Q. See if you think they are about right: July, \$57.52; August, \$64.90, September I have no record of: October, \$73.75; November, \$88.50; December, \$59.00. Are those about right?

A. I couldn't really say.

Q. You wouldn't say they were not right?

A. No sir.

Q. Your earnings run quite a little different in the different months?

A. Yes sir.

Q. *That* would be the cause of that?

A. Well, I laid off in the winter time if I wasn't feeling well I would lay off.

Q. The difference in the earnings would be due to the lost time?

A. Yes.

Q. You wouldn't work over time very much?

A. No sir.

Q. Did the rest law apply to you? Do you know what I mean?

A. No sir.

193 Q. That is that national law according to which these train men have to go in and rest.

Objected to as the witness is not competent to testify on that.

Q. Did you have to sign any paper showing the number of hours of service?

A. No sir.

Q. You haven't any record or memoranda of your own to show what you received each month of the year before you were hurt?

A. No sir.

Q. You haven't kept any track or account at all of what your average earnings were or how much lost time you had?

A. No sir.

Q. What kind of sickness or trouble was it you would lose time from?

A. Not feeling well and one time I wrenched my wrist and I was bothered with a pain in my hip.

Q. Rheumatism?

A. Rheumatic lumbago.

Q. Neuralgia?

A. No, I don't think it was neuralgia.

Q. Isn't it a fact you didn't work in September at all?

A. I don't remember; I worked a while I guess.

Q. Do you remember whether you laid off during that month?

A. Yes sir.

Q. Why was it?

A. I had a lame hip and a pain in my hip.

Q. What were you treated for?

A. Rheumatism and lumbago, I had liniment I used; it was something that would come on suddenly and all at once.

Q. Had you been bothered with that before?

A. I have been bothered with that for years more or less.

Q. It would cause you to lose some time?

A. Sometimes it wouldn't bother me for a long time and then when I got a little cold it would start and sometimes it would start and I wouldn't know what started it. I fired an engine when I would have to put my leg out straight to shovel the coal in the furnace on account of the pain. Sometimes it would last for a long time and other times it wouldn't bother me for a long time.

Q. You had to give up engineer work because your eyes failed you?

A. Yes sir.

Q. That was some 14 or 15 years ago?

A. Yes sir.

Q. What was the way in which your eyes failed?

A. When I went firing first, I fired from Eland Junction
194 to Rhinelander.

Q. Just make it as brief as you can.

A. We slept in box cars—there was no hotel—and there was a stove in the car that kept fire part of the night. The wiper and I would keep the fire in and it was hot the early part of the night and we would kick the clothes off, and later it would grow cold and we would be exposed to the cold and my eyes began to matterate and when I would wake up in the morning I would have to pick them open. I paid no attention when it started, then it dried up and I supposed it was getting better but after this mucus went away my eyes felt as though there was sand in them and from that I had granulated eyelids.

Q. That was the cause of your eyes putting you out of business as engineer?

A. Yes sir.

— That was during what year?

A. I think that was in '82.

Q. You commenced firing in '82?

A. I was firing then.

Q. You kept on firing on a run?

A. I thought you asked me in reference to the time my eyes got sore.

Q. I mean the time you started running an engine?

A. I started running an engine in '86.

Q. How many years did you run an engine?

A. I think ten or eleven years.

Q. Along about '97 you quit then?

A. Yes sir.

Q. This trouble you had reference to was about the time you commenced to fire?

A. That was the time it started. My eyes never bothered me before that.

Q. It wasn't until 1897 that your eyes gave out?

A. I don't remember as to that.

Q. You run an engine 11 years?

A. Yes, somewhere around there.

195 Redirect by Att'y MARTIN:

Q. Yesterday Mr. Smart asked you to read from a statement you made wherein you censured no one for this injury. Will you give a full explanation of why you made that statement.

A. Well, when I got hurt my brother came up to see me; it was before I made out any report at all, and he asked me if I made out a report and I told him no, I had not; I didn't think I was able to.

"Well, he says, when you make out your report don't you censure nobody for that; don't put any employee in trouble or censure them or the company. He says the company will treat you right.

Q. Was your brother at that time employed by the company?

A. Yes sir.

Q. In what capacity?

A. Engineer.

Q. Was that the reason you made that report?

A. Yes sir.

Q. So that no employee of the company would get into trouble?

A. Yes.

Q. And supposing that the company would do what was right with you?

A. Yes sir.

Q. I show you rules of the company on page eight, train rules and regulations of the operating department effective September 1, 1910, and I call your attention to rule "P" on page eight and ask you to read it and state whether or not that was a rule in force at the time you were hurt?

A. Yes sir.

Rule Offered in Evidence.

"Every employee must keep the premises subject to his control neat and cleanly, and must take -very precaution to guard against loss or damage by fire."

Q. Counsel asked you yesterday whether or not it was the duty of employees of the yard to look out for this. In what way?

A. It would mean for the employees in the yard to look out for themselves for the ringing of the bell and the whistle I said.

Q. In other words it is the observation of the rules and signals?

A. Yes sir.

Q. You said the work was dangerous? State as a matter of fact if all railroad work isn't more or less dangerous?

196 A. Yes sir.

Q. You said that you knew it was dangerous to walk up to this place? State whether or not knowing the use that was made of that track, and knowing what the danger was, was one of the things that made you stop and listen attentively for the bell to sound?

A. Yes it was.

Q. Could you from the place where you were when you started to go back to the shanty get to the shanty without crossing the track?

A. No sir.

Q. So that in order to get to the shanty, no matter which side of the track you took you would have to cross over that particular track?

A. Yes sir.

Q. After you crossed the track at the point where you were to the east side what would you come in contact with?

A. With the amount of steam there was nothing to guide me and I would have to walk on the edge of the wall or the top of the wall or either use the space between the cars and the wall with nothing to protect me or to guide my way.

Q. In other words, if you crossed over to the east you would be right on the narrow brow of the east rail on a narrow track?

A. Yes sir.

Q. What did you have to guide you by keeping on the west side of the track?

A. I had the coal shed.

Q. And after you passed beyond the sunken track and north what would you come to then after you got to the east side?

A. There was a pile of ties there.

Q. How close did this pile come to the east side of the track—to the east rail?

A. The pile of ties was on the north end of this track to my judgment and was apparently like a tie would be set under the track.

Q. How close would the ends of those ties come to the east rail of the track you would have to cross?

A. If you went up to the east rail you would have to climb over the pile—

Q. If you went between the pile of ties and the east rail how much space was there in there?

A. Well, there was, I think a little more than the length of the ties that was going in on the track—a little more.

Q. Do you mean the length that extends beyond the track?

A. Yes sir.

Q. Tell me in feet?

A. That is a pretty hard thing to guess and I would have to guess it.

Q. Don't guess at it form a judgment?

197 A. It might have been three feet.

Q. Then when you advanced further north you would come to this steam box?

A. Yes sir.

Q. How close is the west end of the steam box to the near rail?

A. I should judge about four feet with the platform in front of it a little higher than I am (indicating).

Q. Was the west end of the steam box four feet from the east rail?

A. I think it was.

Q. Knowing the premises along there as you did on either side, which side was the safer?

A. The west side by far in my judgment.

Q. Anything on the ground, any bank of snow or anything else that would prevent you walking along on the west side?

A. No sir.

Q. Counsel had suggested that the snow was thrown up against the coal shed and that the steam discharged there would thaw it and then again it would become frozen?

A. No sir.

Q. On which side was that?

A. On the west side.

Q. You were talking about the west side?

A. Yes sir.

Q. I said counsel spoke of there being a bank of snow along on some side?

A. Yes sir.

Q. Which side was that on?

A. I cannot say it was on any side at that time.

Q. At that time?

A. No.

Q. That would happen at times and then be carried away?

A. Yes, it was generally at that point that it was shoveled away or tramped down.

Q. So on that occasion at that time there was *any* bank of snow or anything in there between the coal shed and the west rail to prevent you walking along there?

A. No sir.

Q. You said that when you stopped and listened that your shoulder was rather against the studding of the coal shed?

A. Yes sir.

Q. Did your body set in between the studding to any extent?

A. It might have a little.

Q. When you attempted to step east did you advance your body with your step?

A. Yes sir.

Q. So that at the time you were struck was your body out beyond the stud and even with your step?

198 A. My head was extended out the furthest.

Q. It was your head that was struck first?

A. Yes sir.

Q. Did any part of the engine, in fact, strike your left shoulder and arm or were you thrown against the studding when you were struck by the engine on the head?

A. I was thrown against the studding.

Q. Then it isn't your claim that the engine struck your left shoulder and arm.

A. No sir, Not to my knowledge.

Q. When you had this dangerous place which you have reference to was it a common occurrence for an engine to move along in there without giving the proper signals?

A. Yes sir.

Q. How slowly can you move an engine—drift an engine along there at that place—that is, how slowly is the slowest rate of speed at which you can move an engine over the cinder pit up north towards the round house?

A. Why, you can move an engine across that pit so that if you were standing in front of it you wouldn't know it was moving at all.

Q. Without using steam an engine will drift along very slowly?

A. Yes sir.

Q. You can move an engine without working steam?

A. Yes sir.

Q. If they do that does it make less or more noise than if using steam?

A. Less noise.

Q. When you move an engine at all you must move at some rate of speed?

A. Yes sir.

Q. What is the lowest rate of speed which you can move an engine along a line at that place with or without steam?

A. Well, I can move an engine so you can hardly tell it is moving.

Q. Can you move it a good deal slower than an ordinary walk?

A. Oh, yes.

Q. Have you submitted your person for examination by physicians for the defendant company at its request?

A. Yes sir.

Q. And more than once?

A. Yes sir.

"The Defendant Admits that it is the duty of the train men and engineers and firemen to examine the bulletin boards from time to time and to such an extent as is necessary to get information as to the bulletins and orders regulating or governing their 199 service."

It is also admitted that they are subject to expulsion or expulsion if they do not do so.

By Mr. MARTIN:

The plaintiff offers in evidence the last paragraph of on Page 10 the defendant's definition of the term yard which reads:

"Yards:—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized time table by or by train order may be made, subject to prescribed signals and regulations."

By Att'y SMART:

Q. You don't claim that that blow off box has been moved since the accident?

A. No sir.

Q. Same position now as it was then?

A. I don't know.

Q. You don't know of its having been moved?

A. No sir.

Q. I want to call your attention to Defendant's Exhibit 3 and ask you if you mean to say that the end of that blow off box is only four feet from the east rail?

A. Well, I didn't say positively it was; that was my best judgment.

Q. It might be five feet nine inches?

A. It might be; I never measured it.

Q. What is the distance, if you know, between the sand house and that rail up there?

A. I don't know the distance.

Q. Do you know whether it is any greater or any less than the distance between that blow off box?

A. It is wider.

Q. What is the distance between that wood bin up there and the rails that you walked down by on the east side?

A. I should judge about three feet.

Q. You said that, as I understood from Mr. Martin, that these ties at the end of the depressed track extended about as far out from the rail as the ties would that were under the track?

A. I said I thought it did.

Q. What is the distance which the end of the tie extends out from the rail?

A. I couldn't tell you.

200 Q. About a foot isn't it?

A. About a foot or eighteen inches it might be.

Q. Of these two tracks you wouldn't say but what the depressed track and the cinder pit track were 15 feet apart would you? The centers of them?

A. The cinder pit and the depressed track? It might be a little more than that.

By Mr. MARTIN:

Q. That is from center to center between the rails?

A. Yes sir.

By Att'y SMART:

Q. You haven't measured the distance that that stone wall along the depressed track extends north of the coal shed have you—north of the south end of the coal shed?

A. No sir.

Q. As I understand it when you started from that south end of the coal shed you could have gone diagonally across the stone embankment there?

A. Yes, I could have crossed either way.

Q. That would simply have been at an angle of 45 degrees?

A. I don't know how many degrees.

Q. You are enough of an engineer to tell how much 45 degrees are?

A. No, I don't think I am.

Q. Do you know what 90 degrees are?

A. No sir, I do not.

Q. Do you know what 90 degrees would mean in that space?

A. No sir.

Q. A quarter of a circle is 90 degrees and split that in two would be 45 degrees. Now can you tell what angle that would be in there?

A. No.

Q. Do you know anything to prevent you from leaving that corner at the shed and going at an angle almost due north east and going then to right where the pile of 10 ties or about that number of ties were piled as you testified to?

A. Yes sir.

Q. What was there to prevent that?

A. Because I had to walk across anyway which I told you often and I considered this side the safest in my judgment and that was the reason I undertook to cross there.

Q. Do you know of any other reason to prevent you?

A. Because I considered that side was safer and better walking.

Q. That was all?

A. Well, that was enough.

Q. There wasn't any barrier in there to stop you?

A. It was better walking.

201 Q. Better walking between the west rail and the shed than it was across the track?

A. Yes sir.

Q. Why?

A. Because there was two rails to cross and the wall on the other side or walk on top of the wall.

Q. Difficult to cross those two rails was it?

A. It was difficult to walk across those two rails; it was an obstruction.

Q. And if there wasn't any two rails there you would have gone across?

A. Yes sir.

Q. And there was some kind of obstruction on the other side but not so difficult to walk?

A. If you didn't have the coal shed and track.

Q. And on account of these two rails was the reason why you didn't cross?

A. No sir.

Q. Then that being the physical condition had nothing to do with the reason and the only reason was because you considered it safer?

A. Safer in my judgment—I had something to guide me.

Redirect by Att'y MARTIN:

Q. Mr. Gray was there any railing or any wall on that sunken track to prevent you from -topping down there or to stop you?

A. No sir.

Q. There was a railing in one place there but that wasn't on the sunken track?

A. No sir.

Q. Do you know how deep the space is between these studdings, that is how wide the studdings are?

A. May be 10 or 12 inches.

Mr. Kane Recalled.

202 Mr. KANE recalled as adverse witness for further cross-examination.

Examined by Att'y P. H. MARTIN:

Q. Mr. Kane, when you passed over the cinder pit on north to the point where you stopped was your engine working steam or not?

A. I don't remember whether I was working steam or whether the engine was drifting.

Q. Don't you know that you were drifting?

A. I don't; I don't remember.

Q. Why is it you don't remember that?

A. Well, the engine might possibly be drifting and I might possibly be working steam, according to the rate of speed I was going. I may have slowed up and started that rate again.

Q. You might be working steam, at one place and not at another?

A. Yes, I might open the throttle a little bit and shut it off again.

Q. You don't remember whether you did that or not?

A. No sir, I don't remember.

Plaintiff offers in evidence from revised ordinances, city of Antigo, March 22nd, 1906, published in pamphlet form, Chapter 12 on Page 19, the whole chapter and sections one to five, inclusive.

Objected to as incompetent to prove any ordinance which does not purport to be published by any authority and it is not known that there is such ordinance. Objected to as incompetent, irrelevant and immaterial, and not at issue here.

Objection sustained for the time being.

Mr. GRAY recalled for further examination by Att'y MARTIN.

Q. Is there any history of tuberculosis in your family, Mr. Gray?

A. No sir.

203 Q. On either side—your father's or mother's?

A. No sir.

Q. Or among your brothers or sisters?

A. No sir.

Q. How many brothers and sisters did you have?

A. I had four sisters and three brothers.

Q. All live to grow up to men and women?

A. Yes sir.

Q. Any of them have any tuberculosis?

A. No sir.

Q. Is there any area on the top of your head where there is a numbness?

A. Yes sir.

Q. From this scalp wound across to this one in front?

A. Yes sir.

Q. What extent is that now?

A. Why, if I feel an itching there I can't relieve it by scratching.

Q. Did you give Dr. Donohoe a sample of your own sputum for examination? Was what you gave him yours?

A. Yes sir.

Q. You also gave a sample of your sputum for examination to the doctors of the defense today?

A. Yes sir.

Q. What did you do with it?

A. They got it.

Q. And it was your own you furnished Dr. Connel and Dr. Levings?

A. Yes.

Q. Are all these marks on your face marks that you sustained at the time of the accident?

A. Yes sir.

Q. Both on the right cheek, left cheek and chin and lips?

A. Yes sir.

Q. How far apart are these studdings? Are they so far apart that a man can stand in back and face the coal shed when a train is going by?

A. Yes sir.

Q. Have you done it?

A. Yes sir.

Q. Stood in there easily without crowding?

A. Yes sir.

With the exception of the question of admitting the ordinance the plaintiff now rests.

204 By Att'y SMART: At this time the defense requests a special verdict.

S. S. LONG, being first duly sworn, testified for and on behalf of the defendant.

Direct examination by Att'y SMART:

Q. Mr. Long, you are in the employ of the Chicago & Northwestern Railway Company?

A. Yes sir.

Q. What is your first name?

A. Sidney.

Q. What is your business, an engineer?

A. Yes, civil engineer.

Q. Did you recently make some measurements around the coal shed cinder pit and adjacent buildings at Antigo?

A. I made some such measurements several months ago. I don't recollect when.

Q. Have you the original memoranda with you?

A. No sir, I put that right on here.

Pl'tf's Ex. A.

Q. I show you a blue print marked plaintiff's Exhibit "A" for identification, and ask you if you made the original memoranda on that and your measurements on that blue print? Is that the original paper on which you made your memoranda?

A. That is the blue print on which I put my original notes and afterwards inked them up. I had this with me when I made the measurements.

Q. That is the memoranda you made at the time you made the measurements?

A. Yes sir.

Q. I will ask you what the length of the cinder pit was at that time.

A. 80 feet.

Q. What is the distance from the northwest corner of the cinder pit to the southeast corner of the coal shed?

A. Six feet nine inches.

Q. Just right near the southeast corner of the coal shed what is the distance between the west rail of the coal shed track and the studding of the coal shed?

A. Three feet nine inches.

Q. What point of the rail is that measurement made from if you remember?

205 A. I believe that is made from the gauge line at the inside of the rail.

Q. What is the distance from the west end of the blow off box to the east rail of that track?

A. Five feet nine inches.

Q. As you get to the north end of the coal shed what is the distance between the west rail of that track to the studding of the coal shed?

A. Four feet five inches.

Q. Are these the only measurements that you have memoranda of?

A. Yes sir.

Q. That track gradually goes out wider as you get to the north end of the coal shed?

A. Yes sir.

Q. The separation of the track and coal shed is graduated there that distance?

A. Yes it is gradual; it must be uniformly gradual.

Q. Those are the only measurements you made at that time?

A. There are several others on the print that I took that you have not asked me about.

Q. The distance between the wood bin and the east rail of the track is what?

A. Five feet six inches.

Q. At both ends of the wood bin?

A. Yes sir.

Q. What are the inside measurements of the width of the clinker pit?

A. 13 feet from the west wall to the east wall.

Q. That is from the inside of the west wall to the outside of the east wall; in other words, the width of the wall across the track at the south end of the clinker pit?

A. It is the inside wall measurements.

Q. What is the depth of that clinker pit below the rail?

A. Two feet nine inches.

Q. That cinder pit is surrounded by a stone wall?

A. Yes, on three sides—one side and two ends.

Q. It is open on the east side towards the depressed track?

A. Yes.

Q. And the northeast corner as you may see of the cinder pit stone wall is projected north along the side?

A. Yes.

Q. You have taken no actual measurements of that distance?

A. No sir.

206 Q. It is likewise at the southeast corner of the cinder pit, that stone wall is projected some distance south along the cinder pit track?

A. Yes sir.

It is stipulated that the blue print marked Defendant's Exhibit "1," which has been offered in evidence by the plaintiff, may be used by either party to show the location and dimensions of the various objects, tracks and buildings; that it is drawn on a scale of one inch to 40 feet, and that it is assumed to be correct; but that either side reserves the right, in case of any dispute, to correct the same if any inaccuracy is discovered.

It is also stipulated that Defendant's Exhibit "6" is simply an extension of the same blue print, or rather a blue print made from the same tracing, extending the tracks and grounds north of the round house. That it may be used for the same purpose and subject to the same reservation as Defendant's Exhibit "1" at this time offered in evidence.

Cross-examination by Att'y MARTIN:

Q. Can you tell the distance from the west rail of the track to the sheeting of the coal shed right opposite the shanty with reference to this blue print or any data that you may have?

A. I cannot give it exactly. It would be about four feet and six or seven inches. In other words, I believe the studding at that point is ten inches wide.

Q. What I want to get at is the rail. I am not speaking of the distance between the studding to the rail; but from the rail to the sheeting inside the studding? What is that distance?

A. That would be about four feet seven inches.

Q. Is the rail at that point further south from the coal shed than it is further south at the southeast corner of the coal shed?

A. Perhaps two inches.

207 Redirect by Att'y SMART:

Q. It appears that at the southeast corner it is three feet nine inches?

A. Yes, to the studding.

Q. You don't know of your own knowledge from measurements what it is opposite the shanty?

A. No, not from any measurements.

R. F. ARMSTRONG, being first duly sworn, testified for and on behalf of the defendant, as follows:

Direct examination by Att'y SMART:

Q. You are in the employ of the Chicago & Northwestern Railway Company?

A. Yes sir.

Q. How long have you been in its employ?

A. Between 23 and 24 years in Wisconsin and Michigan.

Q. What is your present position?

A. Assistant superintendent.

Q. Of what division?

A. Ashland division.

Q. With residence at Antigo?

A. At Antigo, yes.

Q. You are superintendent under Mr. Quigley?

A. Yes sir.

A. How long have you been assistant superintendent at that point?

A. About three years; it will be four next December.

Q. Were you in service as such superintendent in 1909, '10, and '11, at that point?

A. Yes sir.

Q. Under you do you have a man they call division foreman?

A. Yes sir.

Q. What, in a general way, are his duties?

A. His duties are to look after the motive power in a certain district. I think his district includes Rhinelander, Marinette by the way of Eland, that would take in and around Rhinelander, Monico, Junction, Pelican, Antigo, Eland Junction, Wausau and Marshfield.

Q. Does it take anything more in than the motive power?

208 A. Does it take in the yards?

A. No, their duties are confined wholly to the motive power and the engines.

Q. And the running of them?

A. Yes, running of them and keeping them in repair.

Q. You know about the time that Mr. Gray was injured?

A. Yes.

Q. Who was then the division foreman at that time?

A. W. H. Halsey.

Q. Did the division foreman have an office there near the round house?

A. Yes, in one of the buildings.

Q. Where?

A. Just north of the turn table, lying between the round house and the shops.

Q. The turn table is in the center of the round house?

A. Yes sir.

Q. Is there a round house foreman?

A. Yes sir.

Q. Who does he operate under?

A. Under the division foreman.

Q. This division foreman is under your office?

A. He comes more directly under the master mechanic; but we have certain supervision over his office with reference to the handling — motive power.

Q. You issue orders and bulletins that come under his jurisdiction?

A. So far as the movements of trains and engines are concerned.

Q. And the protection of the tracks?

A. Yes, sir.

Q. By the protection of the tracks and switches do you mean the maintenance?

A. Yes, sir.

Q. Is there also under your jurisdiction there a foreman of road engines?

A. Yes sir.

Q. At the time of the accident to Mr. Gray who occupied the position?

A. Mr. Donor.

Q. Was Mr. Ashmore there, also, under your supervision?

A. Yes sir.

Q. What office?

A. Division foreman.

Q. Did he precede Mr. Halsey?

A. Yes sir.

Q. When did he start at that point?

A. I think a year ago last fall.

Q. He must have succeeded Mr. Halsey?

A. No, he preceded Mr. Halsey. Mr. Halsey took Mr. Ashmore's place.

Q. Then Mr. Ashmore must have been division foreman at the time Mr. Gray was hurt?

A. No, Mr. Halsey must have been division foreman.

Q. It is claimed in this case that an order or bulletin of some character in relation to the stopping or stationing of engines running in on the coal shed track was issued by you prior to the time that Mr. Gray was injured? Did you ever issue any order or bulletin requiring engines to stop south of the cinder pit?

A. I did not, no sir.

Q. Did you issue an order or bulletin with reference to engines coming in on the track stopping on or near the wrecker switch?

A. I did; I issued a memoranda to the division foreman—not a formal regular bulletin; it was directed personally to the division foreman.

Q. State the substance of that bulletin or memoranda or whatever you call it—how it came about and how it was written by you and what you did with it?

Objected to as incompetent. Sustained. Exception.

Q. What was the contents of that bulletin?

A. It read in words something to this effect: to please arrange to discontinue engines stopping on the wrecker track switch to prevent the switch being frozen up. There was a certain amount of drip when an engine was allowed to stand there and it froze the track up.

Q. I show you defendant's Exhibit "6" being blue print of that locality and ask you where the switch stand is that leads into the wrecker track to which you refer?

A. It is at the northeast corner of that coal shed.

Q. Is the switch stand at the point where I have marked with the letter "a" with a circle around it?

A. Yes sir.

Q. Where would that switch open up with reference to that stand?

A. Right in front of it directly, that is within a few inches. The connection is perhaps six inches from that point.

Q. I show you switch stand at the point marked "b." What switch stand is that? —. That is known as the outgoing track from the turn table.

210 Q. How was this order you refer to written?

A. It was written on a plain piece of paper with a lead pencil.

Q. Was it addressed to any particular person or not?

A. It was addressed to the division foreman using his initials.

Q. How were your regular bulletins customarily issued at that time?

A. Bulletins are issued with a typewriter or mimeograph and copies made of them.

Q. And a record kept in the office of them?

A. Yes sir.

Q. Are they written in serial number?

A. Yes sir.

Q. Issued in serial number and a record kept of them or mimeograph copy?

A. Yes sir.

Q. Are they fastened together?

A. They are secured on a file.

Q. Have you had or caused to be made an examination to see if you could find any bulletin covering the question of stopping engines south of the cinder pit?

A. I have.

Q. Can any such bulletin or order of any such kind to be had?

A. It cannot.

Q. Have you caused an examination to be had of all files and records with reference to finding this original pencilled order that you made?

A. Yes sir.

Q. Can that be found?

A. No sir, it cannot.

Q. How long before this accident to Mr. Gray was this written order you refer to made?

A. I should judge about a year.

Q. In the fall or in the winter?

A. Along in the winter. Possibly January or February. It was pretty cold at the time and there was considerable snow and ice on the ground in that vicinity.

Q. As a railroad man and assistant superintendent there you know the situation with reference to this track leading in and around the coal shed and cinder pit do you?

A. Yes sir.

Q. About how many engines can stand on the coal shed track south of the cinder pit before you get to a point necessary to clear what they call the out-going track from the round house?

A. About five engines.

211 Q. During this time and previous to the time when Mr.

Gray was injured what was the fact as to how many engines were occasionally put there to be dispatched at one time?

A. That of course varies. Sometimes one or two; sometimes 10 or 11. I have seen it congested.

Q. Do you know of your own knowledge about what the average number of engines were coming in there to be dispatched in 24 hours or during that time?

A. I should say in the neighborhood of 25 to 30 a day in 24 hours.

Q. These men work in what they call tours to a certain extent.

A. I don't just understand.

Q. In day crews and night crews?

A. Yes sir.

Q. When is the least congestion—in what period of the 24 hours?

A. Usually in the mornings and evenings.

Q. In the morning when night crews come in and evenings when day crews come in?

A. Yes sir.

Q. As a railroad man and knowing the situation and having it in mind there at that place would an order arbitrarily requiring all engines to stop south of the cinder pit be practicable.

Objected to as leading. Objection withdrawn.

A. It wouldn't.

Q. Why?

A. Because there is very frequently congestion on that track and were the engines compelled to stop south of the cinder pit it would block the out-going track.

Q. It is necessary to have as little blocking of the out-going track as possible?

A. Yes sir.

Q. As I understand for that reason as occasion requires, you would need all the room above the cinder pit to handle the engines that you could get?

A. Yes sir.

Q. To what extent would you get from time to time around there in the discharge of your duties. How often would you get around this cinder pit track where you would have occasion to observe how many engines were in there at one time for dispatching?

212 A. Some times I might be up there three or four times a day; other days perhaps once only.

Q. What would you say as to whether or not you were there as a rule every day or a part of a day?

A. I am required to be away to some extent. Some times I am away three days a week; then three days I am in the office all day.

In such times as the congestion is *series* at that point I devote a great deal of my time to Antigo, some weeks perhaps I am up there every day.

Q. Do you know from your own observation and knowledge what the custom and practice was prior to the time of the accident to Mr. Gray with leaving engines north of the cinder pit track when that track was clear, if you know?

A. Yes, I have observed a good many times that engines going in, if the track was clear, ordinarily they would go pretty well towards the north end of the track; the men usually like to go as close as they can to where they get off.

Q. That practice went on to your knowledge?

A. Yes sir.

Q. And you didn't cause it to be stopped?

A. No sir.

Cross-examination by Att'y P. H. MARTIN:

Q. In view of the fact, however, since this law suit is pending against your company, of course you sanction the practice?

A. I don't understand just exactly what you mean.

Q. The practice of going north of the cinder pit. You wouldn't find fault with it now in view of the fact there is a law suit pending?

A. It is no different now from what it was prior to the accident. There has been no change.

Q. You frequently in your capacity do issue bulletins?

A. Yes.

Q. As often as required?

A. Yes sir.

Q. How often is that usually?

A. Some times not for a month or two.

Q. What was the date of this so-called memoranda that you pencilled?

A. I couldn't say.

213 Q. Tell us how it read. Begin with the first word and finish with the last?

A. I don't know as I can give the exact wording on the paper; but I remember very distinctly what my intention was.

Q. Can you tell us the month in which it was issued?

A. I wouldn't be positive whether it was January or February. Along there some time.

Q. How long had that practice of engines stopping on the switch and freezing the switch existed before you issued this bulletin?

A. I didn't issue any bulletin.

Q. This memoranda or whatever you are pleased to call it?

A. Well, I presume it had been going on all winter before I discovered it.

Q. All the winter before?

A. I don't know. We generally make a practice of keeping the switch clear in the winter time.

Q. What did you do the winter before?

A. It must have been clear or I would have called attention to the fact it would be frozen up.

Q. There must have been some need of issuing this pencilled memoranda or bulletin?

A. Why, yes, I came along there in the morning and found this track frozen up; I arranged to have this ice picked out so we could get the wrecker on a moment's notice. My purpose was to prevent it being frozen up again.

Q. Is that the first time you found it frozen up?

A. To the best of my recollection it is.

Q. The testimony of your men is that it was frozen prior to that time. What was your observation?

A. I think that is the first time I found it frozen up.

Q. Did you ever issue any bulletin or order regarding the matter of stopping on that switch before?

A. No sir.

Q. Is there anything in the custom or practice that that would differ as to one way rather than another?

A. I don't think there was.

Q. I suppose if the track was very congested they would probably be required to stand on this switch though they had ten or eleven engines?

A. Yes.

Q. There is only room for five below the cinder pit?

A. Yes.

Q. How many are there room for north of the cinder pit to
214 between that and the switch track that you speak of?

A. Between the cinder pit to the wrecker track switch?

A. Off hand I should say about five or six engines.

Q. So if you had ten or eleven engines in there at one time you would be pretty crowded to stop?

A. No sir, about two could be left north of the switch.

Q. You wouldn't have much space to spare?

A. Only need a little space to keep that clear.

Q. Can you tell us what the bulletin pertained to that was last past before this pencilled bulletin?

A. No sir.

Q. Can you tell us what the next one was?

A. No sir.

Q. Can you tell us what it pertained to?

A. No, I couldn't now.

Q. Can you tell us what any bulletin contained that you issued upwards of a year ago, without referring to your memoranda, other than this one?

A. Oh, yes, I have issued a number. About a year ago I remember very distinctly of issuing one in reference to the yards here at Appleton junction.

Q. What did that contain?

A. It was assigning different tracks for certain cars, for instance, tracks coming into Appleton on the north side would place cars going north in that direction.

Q. In other words you remember the purpose of the bulletin?

A. Yes.

Q. Mr. Kane says this bulletin was read by him and it said engines coming in from south will stop south of the cinder pit. Mr. Gray says he read it a couple of times and it so read. Are you prepared to deny that it contained that?

A. I am; it contained nothing of the kind.

Q. Did you sign this bulletin?

A. Yes, with my initials.

Q. I suppose if you had these engines stop south of the cinder pit it would accomplish the purpose of keeping the wrecker switch clear of ice?

A. Well, no, I don't think it would.

Q. I suppose if you stopped one of these engines south of the cinder pit track it would be less likely to block the switch with ice than if it stayed on the switch track?

215 A. If it would stand any place on the track it wouldn't block that track.

Q. If your purpose was to prevent this wrecking track switch from being blocked with ice you could have effectively accomplished that purpose by requiring engines to stop south of the cinder pit?

A. If I did that? They go up and down that way; it would block both tracks.

Q. If they didn't stop there would it freeze up?

A. Why, certainly, if they didn't stop on the switch, it wouldn't freeze up.

Q. After an engineer passed over that cinder pit was it always so clear in there that you could observe if they stopped on the switch or not?

A. He would have to clear that some distance before he came to the wrecking track.

Q. Your answer would be then that it was so clear in there at all times that he could avoid stopping on the wrecking track?

A. Yes, he could have avoided stopping in there.

Q. How far, about, was it common for smoke and steam to be carried towards these buildings when the wind was blowing from the south?

A. I never saw it carried any great distance.

Q. Have you ever seen any smoke there at all?

A. Yes, some.

Q. Large volumes?

A. No, not a large volume.

Q. Just a little trickling I suppose?

A. It would be hard to describe it.

Q. Did you ever see enough to obscure your hand when you put it out in front of your face?

A. If a person was right in there it might.

Q. Was it thick enough to encompass a man as big as you are?

A. There might be that much.

Q. How often did you see ten or eleven engines in there waiting to be dispatched?

A. It wasn't an infrequent thing to see that many in there.

Q. How many men did you have to take care of them at that time?

A. I couldn't say; that is not under my jurisdiction.

Q. Are you quite sure you have seen ten engines in there on that one track waiting to be dispatched?

A. That is on the entire track.

216 Q. I mean from a point south of the cinder pit where you call the out-going track to the round house, taken all the way up there?

A. Yes, I have seen it.

Q. Did you ever have your entire out-fit of engines in there?

A. At one time? Hardly.

Q. But you claim that the number of engines usually handled there in 24 hours are how many?

A. In the neighborhood of 25 to 30.

Q. Daily?

A. Yes, sometimes may be more.

Q. How long would it take two men to dispatch eleven engines?

A. Well, that I don't know; I have stood around there long enough to see eleven dispatched.

Q. If there were eleven engines on that track at one time it would block that track pretty badly wouldn't it?

A. They would probably manage to shift a few off just as soon as they saw that another engine put down there would block the track.

Q. By the way, any engine coming it to go over to the round house would be blocked?

A. Certainly.

Q. If there were ten or eleven engines in there any one time to be dispatched for how long a time would the track be blocked?

A. It would be blocked for several hours.

Q. Do you know what the distance is from a point where an engine standing on this track would clear the out-going track north to the round house?

A. I don't understand what you mean.

Q. From a point on this track from which an engine to be dispatched stood where it would clear the switch south of the out-going track, from there north to the round house. Down here south of the cinder pit this track connects with the out-going track?

A. Yes, sir.

Q. At that point with an engine standing where it would clear it how far north is the round house along that track?

A. I couldn't say exactly.

Q. How many engines will it hold with their tenders?

A. If you can fill it full I think you could get 12 to 14 engines in there.

Q. Is that the most?

A. I would think so.

217 Q. Does that contemplate filling the cinder pit?

A. Covering the entire track.

Q. You have got to have some space in there to move engines to the cinder pit and off?

A. Yes sir.

Q. Suppose you had five below the cinder pit and five above what engine would you first take to clean?

A. That would depend wholly upon what time the engine was needed the way they get them.

Q. I said suppose you had five engines below the cinder pit and five engines above it and you are going to dispatch one of them, which one will you take to dispatch—the first one up on the cinder pit?

A. As I said that would depend wholly upon the engine that was wanted.

Q. You would have to take the one nearest wouldn't you? You couldn't jump over an engine?

A. They would run the others over to the round house?

Q. You would have to run all the engines off that track to get the one you wanted?

A. Yes sir.

Q. Have you ever seen it being done?

A. I have.

Q. You avoided it as much as you could?

A. We couldn't at times.

Q. You know as well as you are sitting in that chair that when you would dispatch engines it was the custom and practice to keep that north part entirely clear so that when an engine was dispatched that would clean out all the cinder pit and you run them up to the round house?

A. That is what I said, yes.

Re-direct examination by Att'y SMART:

Q. Have you ever known any man to be suspended or discharged for leaving his engine north of the cinder pit for the purpose of being dispatched.

Objected to. Objection sustained. Exception.

Q. Did you ever issue any order or bulletin requiring the leaving of engines south of the cinder pit?

A. I never have, no sir.

Q. Or know of any being issued?

A. No sir, I do not.

218 CLAUDE ASHMORE, being first duly sworn, testified for and on behalf of the defendant, as follows:

Direct examination by Att'y SMART:

Q. What are your initials, Mr. Ashmore?

A. A. C. D.

A. Where do you live?

A. Clinton, Iowa.

Q. You are in the employ of the Chicago Northwestern Railway Co.?

A. I am.

Q. During the winter of 1910 and 1911 were you in the employ of the same company?

A. Yes sir.

Q. Where?

A. I lived in Antigo in December, 1910. Prior to that I was there, too.

Q. How long were you there at Antigo prior to December, 1910?

A. One year and one month and prior to that I was in Fond du Lac six months and prior to that I was in Antigo a year.

Q. Then you were in Antigo from December, 1909 to December, 1910?

A. From October, 1909, to December, 1910.

Q. Do you remember of a bulletin being issued or an order being issued by Mr. Armstrong which was delivered to you, in relation to stopping engines on the cinder pit track over the switch leading to the wrecker track?

A. Yes sir.

Q. What kind of an order or bulletin or memoranda was that?

A. That was on what we call scrap paper about six by eight, blank paper, addressed to me.

Q. Written in ink, lead pencil or typewritten?

A. Lead pencil.

Q. Signed by whom?

A. Addressed to me by initial and signed by Mr. Armstrong by initial?

Q. Addressed to you?

A. Yes, came to my office.

Q. Put up where?

A. On the bulletin board in the engineers' room.

Q. You don't know what has become of that since?

A. No sir.

Q. Can you state the substance or contents of what that order was.

219 A. The instructions were that engines must not be left on the wrecker track switch on account of freezing up the switch?
Q. Did that bulletin or order say anything about engines being stopped south of the cinder pit?

A. No sir.

Q. Did you ever know or see or have delivered to you any order or bulletin directing engines to be stopped south of the cinder pit?

A. They couldn't run there if such an order was issued.

Moved to strike out the answer as not responsive.

Motion granted.

Exception by defendant.

Question read by reporter.

A. No sir.

Q. Are you positive in regard to that?

A. That is, not while I was there.

Q. Were you division foreman?

A. Yes sir.

Q. The man referred to here by Mr. Armstrong in his testimony?

A. Yes.

Q. You had under you as foreman of the round house, whom?

A. C. E. Mohle.

Q. Mr. Halsey was his division foreman?

A. Yes sir.

Q. If there had been any such order as I referred to in reference to stopping south of the cinder pit you would, in the discharge of your duties have learned of it?

A. I surely would.

Q. Was there, in your opinion, any custom or practice which was followed up by the engineers and fireman by which they left their engines south of the cinder pit as a rule? Was there any such custom or practice?

A. No sir.

Q. What was the common custom or practice with reference to where they did leave their engines if the track was clear north of the cinder pit?

A. They generally try to get as close to the round house as they can. They crowded that as far as they could.

Q. Where would they take them?

A. Up near the round house; beyond the coal shed if they could get through.

Q. Was that done with your knowledge and consent?

A. Yes sir.

Q. Did you ever expel, suspend or discipline anybody for doing that?

A. No sir.

220 Q. Did you understand or know that any such practice was in violation of any such order of any such order or rule?

A. No sir.

Q. About how many engines could stand on the round house track south of the cinder pit and to a point far enough south so it would clear the out-going track?

A. I should judge about four engines if clear up to the switch.

Q. As division foreman do your duties require you to occasionally be around this track at times of the day when there would be the most congestion of engines to be dispatched?

A. I had full charge of that track.

Q. How frequently from day to day or hour to hour would you be around there?

A. Probably two or three times to a dozen times a day. Then there might be a day or two I might be gone part of the time to Marshfield or Waupaca.

Q. I understand that most of the work done around there would be to your knowledge.

Q. You saw this practice as to where they left the engines?

A. Yes.

Q. What time of day was it when it was most congested in delivering and dispatching engines?

A. As a rule night and mornings when engines are turned in in addition to road engines.

Q. Have you observed from time to time how many would be there ready to be dispatched at any one time?

A. I have seen six or eight engines there at one time, may be more.

Q. That many would be there frequently at times of congestion?

A. Yes, may be more; might be as many as 10 or 12; all depends on the business.

Q. From your experience and knowledge there of the business, and as a practical railroad man, would an order or requirement arbitrarily requiring all engines to be dispatched to stop south of the cinder pit be workable or practicable at that place?

A. No sir.

221 Cross-examination by Att'y P. H. MARTIN:

Q. Why not? Why not to stop south of the pit?

A. Because it would not hold enough engines at times when business was good.

Q. That is one reason?

A. That is about the only reason.

Q. You cannot conceive of any other reason why it would not be workable than that space would not hold enough engines?

A. No sir, I do not know of any other reason.

Q. Do you mean to tell us that at times you have seen twelve engines on it?

A. I am not quite sure of that number; I know I have seen as many as eight or ten.

Q. When did you see as high as ten?

A. My memory isn't good enough to remember back a year and pick a certain number of engines off that track. Probably nobody's else is either.

Q. So for that reason you leave yourself this wide latitude of from eight to twelve?

A. Yes sir.

Q. How many engines would it hold there?

A. I should say four between the pit and the out-going track.

Q. I mean the whole number between the switch to the south of the cinder pit which connects with it at the out-going track at a point where they enter, clear to the round house?

A. I should say about twelve engines.

Q. You don't know?

A. No sir, I don't.

Q. Can you tell how many feet or yards long that would be?

A. No, I might if I could figure it up by the length of the engines.

Q. Will you swear that you saw twelve engines in there?

A. No sir. I never counted them I told you.

Q. Then you won't swear that you ever saw 12 engines in there at one time?

A. I never counted them.

Q. Are you trying to answer my questions or trying to evade them?

A. Trying to answer them the best I can.

Q. Will you swear that you ever saw 12 engines there?

222 A. No sir, I can't because I never counted them. I don't want to swear to something I ain't sure of.

Q. Will you swear you saw eleven engines there at one time?

A. I told you before I didn't count them.

Q. I understand you, to mean you won't swear that you ever saw eleven in there?

A. Yes.

Q. Will you swear you did see engines waiting to be dispatched both north and south of the cinder pit at one time?

A. Yes sir.

Q. How many did you see north of the pit at that particular time?

A. There might be three or four on each side of the pit to be dispatched.

Q. Well, that would be six—three north and three south—you have seen that condition?

A. Yes sir.

Q. And all these six were to be dispatched?

A. Yes.

Q. Which engine would you take first—the one south of the cinder pit or the one north?

A. He would take the one that was wanted for use first.

Q. Suppose it was the middle one that stopped north of the cinder pit what would he do?

A. Back them up south of the cinder pit or take them up to the north end.

Q. In other words, he would have to take hold of all these engines to get one?

A. He would run them up one at a time or set them over on the other track if he was compelled to do it.

Q. He would take the third on the north end of the cinder pit and run them north somewhere?

A. Yes sir.

Q. Then take the next and run that north?

A. Yes.

Q. Then the next and run that north?

A. Yes.

Q. Then go back and get out the second and run it back on the cinder pit and dispatch it?

A. Yes sir.

Q. Clean it out and when cleaned out run it right north of the cinder pit to the coal shed, fill it with coal and water and run it to the engine house?

A. They probably wouldn't do that; they might be able to switch it where it was going right back to work.

Q. He would have to take it off that track?

223 A. He would take it some other way. I know it ain't practicable but on account of the tracks at Antigo they have to do it. They have to do it in many instances.

Q. If they could put their engines south of the cinder pit and keep the track north of the cinder pit clear it would be a great deal more convenient wouldn't it?

A. It would be more convenient for all concerned.

Q. And save a good deal of work?

A. It certainly would.

Q. And when each train had to be got off, if he found enough room south of the cinder pit, if he brought an engine when there was another to be dispatched at any one time, the proper thing to do would be to stop south of the cinder pit?

A. It would be more convenient, certainly.

Q. To stop them south of the pit?

A. Yes sir.

Q. If you had three engines in and the first man in run north, and the second man run north and the third man north of the cinder pit and he had to pick out the middle engine to be dispatched he would have to run out the other two before he could get the other ahead on the cinder pit track?

A. He certainly would if that engine was going out again.

Q. He would have to take the engines completely off the track?

A. Yes sir.

Q. Do you claim that Mr. Armstrong personally delivered to you, yourself this bulletin or pencilled memoranda?

A. He didn't hand it to me with his hands. It came to me like all matters and bulletins by mail.

Q. All you know about that bulletin is that you got it through the mail?

A. Yes sir.

Q. I don't understand by that you mean the United States mail?

A. No sir, company mail.

Q. And you filed this pencilled memoranda in this box at some time.

A. Yes sir. That is the way all our company mail is handled.

Q. Did you take this bulletin from the mail box and put it up on the bulletin board?

224 A. I saw it on the bulletin board; I couldn't swear that I put it up. The clerks generally tend to the mail. I don't make a practice of putting it up myself.

Q. When did you first read it, after it was put on the bulletin board or before?

A. After it was on the board.

Q. Can you tell what was on the bulletin just before that?

A. No sir, there are a good many bulletins on there.

Q. Can you tell what the one next after that contained?

A. No sir.

Q. Can you tell me what any of them contained in the month of December, 1910?

A. I cannot say that I can.

Q. You know you can't?

— I know I can't and nobody else can either.

Q. We are not asking about what other people can do. When did you cease working there?

A. December, 1910.

Q. When did you say this bulletin was put on the board?

A. Can't say the date.

Q. Did you file it away?

A. No sir.

Q. Did you file any of the other bulletins away?

A. No sir.

Q. Whose duty was it to do that?

A. Some of the bulletins pertain to certain runs. When the bulletin board gets full some are taken off and they are put on file. I cannot tell what became of this particular bulletin.

Q. They are taken off and filed away when they have been left long enough for every one to become familiar with them?

A. Yes, some of them are.

Q. Whose duty is it to file them away?

A. The clerks generally file them away.

Q. Who was the clerk at that time?

A. There are so many I can't remember.

Q. The division foreman's clerk?

A. Well, there were several different clerks there. I don't know just how they are employed.

Q. What date did you get that bulletin in the mail?

A. Can't say.

Q. Are you sure it was in the winter of 1910 and 1911?

A. I am quite sure.

225 Q. Was it in the early part of 1910?

A. There are so many bulletins it is hard to keep track of them.

Q. The early part of 1910 must have been January. I am speaking of the winter of 1910 and 1911? Was it during that winter at all that it was put up?

A. I am quite sure that was the time.

Q. You seem to have some doubt about that in your mind?

A. There are so many bulletins put up you can't remember them all.

Q. That is merely your best judgment?

A. Yes sir.

Q. How did you take care of the switch the winter before? How did you guard or warn against permitting the men to allow the water to freeze there from their engines?

A. There was no warning. They simply cut it out or opened it every morning it froze.

Q. Every morning?

A. When it was frozen I saw them cutting it when it was icy and the switch wouldn't operate?

Q. You permitted that thing to be done rather than keep it open?

A. I didn't have jurisdiction.

Q. This man Armstrong did or he apparently took it on himself at last?

A. Yes.

Q. Did this man Armstrong suffer this switch to be frozen from time to time during all the winter before rather than issue a bulletin warning them to keep off the switch?

A. He probably did.

Q. Did he issue a warning the year before and have it posted up on the bulletin board to keep engines off that switch or not?

A. I don't remember of any bulletin issued prior to this one.

Q. When did you first have occasion to think anything about this bulletin since the time you read it?

A. Well, it is customary for railroad men to read bulletins often until they get fixed in their minds and remember it, but as to the date of the bulletin and things of that kind a man cannot be sure of remembering that.

Q. That does not answer my question. (Question read by reporter.)

A. I don't know as I can remember. When the enginemen discontinued leaving their engines over the switch I noticed the difference in that respect.

226 Q. When did you first think anything about this bulletin since the time you read it last. Have you been thinking at any time about what this bulletin contained?

A. No sir.

Q. Have you been thinking of it at any time since?

A. No, I can't say that I have.

Q. Was it something you tried to charge your mind with?

A. No sir.

Q. Was there anything in this bulletin more than in any other why you should remember it?

A. No sir.

Q. Are you able to remember the contents of any other bulletin that was posted up there in December, 1910?

A. No, I can't say that I can.

Q. Of course if you had been thinking about this every day you would be more likely to remember it, and the point I want to get at is when, after you read it on the bulletin board there at Antigo, did you first think of its contents again?

A. Reading it over I would not keep it in mind any more than any other bulletin; but on account of referring to the icing of the switch I remember it.

Q. You had it in mind thinking it was to prevent the switch being frozen up?

A. Yes sir.

Q. When did you first think anything further about that—all summer?

A. No sir.

Q. All winter?

A. No sir.

Q. Have you thought of it at all last summer or winter or spring?

A. I haven't worked there.

Q. Have you thought of it at all since you left Antigo until you came here now and was asked about it by counsel?

A. There was a question asked me some time ago—No, sir, I haven't, thought of that bulletin.

Q. What was asked you some time ago in reference to the bulletin? How long ago was it?

A. There was no question asked me about this bulletin.

Q. Was there a question asked about any bulletin pertaining to this action?

A. There was a question asked me if I knew of any bulletin being posted up instructing men to leave engines south of the cinder pit.

227 Q. And you said no?

A. I said no.

Q. Are you quite sure this bulletin didn't say stop engines south of the cinder pit?

A. I am sure the bulletin I posted didn't say anything about south of the pit.

Q. Wasn't it quite a common thing for any other than Mr. Armstrong to send some order through the mail that was posted on the bulletin board?

A. Occasionally we would get a message from the train dispatcher.

Q. So it was not an unusual thing to send out orders to be posted up on the board by some one else?

A. No.

Q. Will you swear there was no order that said engines should stop south of the pit? Will you swear that there was no bulletin or order on that board which said that engines coming in will stop south of the cinder pit?

A. I cannot swear that there was no such bulletin as that.

Q. Was there such an order?

A. No such order.

Q. Did you hear Mr. Kane's testimony?

A. No sir.

Q. Did you hear Mr. Gray?

A. I heard Mr. Gray; I heard part of his testimony; I don't just recall — he said.

Q. Would that bulletin be covered there by the next one that was issued?

A. Yes, perhaps it would.

Q. You don't know when this bulletin was dated?

A. No sir, I don't.

Q. Isn't it a fact, however, that all you remember is that the bulletin you saw, you understood that its purpose was to prevent engines stopping over the wrecking track switch?

A. Yes sir.

Q. You simply remember the purpose of the bulletin?

A. I remember the instructions of the bulletin.

Q. Can you give every word of it?

A. I couldn't now after a year. I couldn't give it word for word.

Q. Was it dated?

A. I am quite sure it was.

Q. Where, at the top or bottom?

A. At the top I expect.

Q. Do you know where?

A. I don't just remember where.

Q. Do you know whether it was dated at all or not?

A. I am quite sure that it was because men hardly ever sign their names to a bulletin without dating it.

228 Q. That is the reason you have for thinking it was dated?

A. Yes, that is the custom:

Q. The fact is you cannot recall it was dated but you conclude it was because that was the practice?

A. Yes sir.

Q. Did it have the word Antigo at the top showing where it was originated?

A. I could not say; we make so many memoranda with just initials.

Q. Was it addressed to you by initial?

A. Yes, I remember that.

Q. Do you know how long it stayed up there?

A. No sir, I couldn't swear to that.

Q. You don't, of course, know what was put up there after you left?

A. No sir.

Redirect by Att'y SMART:

Q. With reference to this practicability of that track and the situation there in handling those engines, where they accumulate in large numbers, I want to ask you if there was a way of handling and moving those engines there without getting them on the outgoing track, that is, where there were a number ready to be hostled north of the cinder pit?

A. We would run them across the table and into the round house at times.

Q. There is a track running to the round house to the north?

A. Yes.

Q. With several such tracks leading out?

A. Yes sir.

Q. And also a little stub track leading out from the north end of the round house?

A. Yes, the repair track.

Q. Would they sometimes push those engines up in there to get them out of the way?

A. Yes sir.

Q. And they could go up and down there and still leave the outgoing track clear?

A. Yes sir.

Q. When you say that was a matter of impracticability how do

you mean to distinguish between impracticability and inconvenience?

A. That would depend on how you interpret the words I would say not inconvenient but more impracticable.

229 Q. In other words, if you had a longer track there by the coal shed you could handle engines with more convenience?

A. Yes, more convenient if two tracks or a longer track.

Q. If the engines were allowed to accumulate south of the switch leading into the out-going track and down to Third avenue would that block Third Avenue if there were ten or twelve engines south of the cinder pit?

A. Yes, that would block the street.

Q. Was it more convenient to handle the engines in the way that you have stated than it was to send them on south of the cinder pit and permit them to block the outgoing track and Third avenue?

A. Yes sir.

Q. There was nothing impracticable about running an engine north of the cinder pit if there was no other engine ahead?

A. No sir, nothing impracticable.

Recross by Att'y MARTIN:

Q. You discovered from Mr. Smart's questions that he wanted you to say the work was inconvenient rather than impracticable?

A. I can't say that I discovered anything of the kind.

Q. You said this morning that the work would be impracticable in the way the word was used in the question. Now you are a fellow who understands all right?

A. I said from the way the tracks are that it would make it inconvenient.

Q. Will you tell us what the definition is as you try to distinguish inconvenience from impracticability?

A. I can only define that this way: if I was going to build tracks to the round house for engines to be handled in a practical way I would have two tracks or a longer track to save the inconvenience of handling engines.

Q. How long can engine stand on the track there before being dispatched so it will move in its own steam?

A. That would depend on how large a fire you would leave in it.

Q. They try to leave just as little fire in as possible?

A. Generally a pretty good fire to keep the flues from leaking.

Q. Do they try to leave enough coal to keep a fire a long period of time?

230 A. No sir, they don't figure on having an extra amount of coal in.

Q. Will you tell us, if you know anything about it, about how long an engine will stand there on the track before the steam will be down so it won't move in its own steam?

A. Probably two hours.

Q. You think that would be about the average?

A. Yes sir.

Redirect by Att'y SMART:

Q. What do you—they do if there are seven or eight or more engines in there waiting to be dispatched to keep up steam if necessary?

A. The dispatcher or helper takes care of it if they find it necessary to put coal on before dispatching.

W. H. HALSEY, being first duly sworn, testified for and on behalf of the Defendant, as follows:

Direct examination by Att'y EDWARD SMART:

Q. Mr. Halsey where do you live?

A. Shattou, Nebraska.

Q. You are working for the Northwestern Co. out there?

A. Yes.

Q. Were you working for that company during the winter of 1910 and 1911?

A. I was, yes.

Q. Were you division foreman at Antigo at the time Mr. Gray was injured?

A. I was.

Q. When did you commence to be division foreman at that point?

A. December 15, 1910?

Q. You succeeded Mr. Ashmore?

A. Yes sir.

Q. What was your business before you succeeded Mr. Ashmore?

A. Machine shops foreman at Kaukauna, Wisconsin.

Q. So you were division foreman from December 15 until you left when?

A. I left Antigo November 24, 1911.

Q. You heard some testimony here about an order or bulletin or instructions with reference to not stopping engines on the switch track leading into the wrecker track?

A. I heard the talk here.

231 Q. Do you know where that wrecker track is and that switch?

A. Yes sir.

Q. Do you know of any such bulletin as is referred to while you were there that winter?

A. I don't.

Q. I am referring now to the bulletin with reference to icing the switch of the wrecker track?

A. No sir, I know nothing of it.

Q. You didn't have any knowledge of that bulletin?

A. No sir.

Q. Did you, when you came there, or afterwards, ever see any bulletin prohibiting the leaving of engines north of the cinder pit?

A. No sir.

Q. From the time that you came there on December 15, up to and after the time Mr. Gray was injured, do you know what was the

custom or practice with reference to where they were to leave their engines to be dispatched when there was no engine ahead on that track?

A. Whenever able they would run the engines to the pit.

Q. To stop where?

A. At the water tank, sand house or coal shed sometimes they run up far enough to clear the outgoing track and they have run up as far the round house door.

Q. What practice or custom did they observe with reference to not stopping on the switch of the wrecker track?

A. I don't understand.

Q. In other words, what I mean is: did they stop at that place during that time, did they do as they pleased?

A. I have seen engines stop there; but to state the exact location I couldn't.

Q. To what extent were you around there seeing engines come in from time to time?

A. I would be around there all day some times. Sometimes I was only up there a few hours; there are days when I would be out of town at some other point.

Q. Do you know about what the distance is between the cinder pit and the clearance for the switch leading to the out-going track. You have in mind that location have you?

A. Yes, but I don't know the exact distance; I would imagine it would be 300 to 350 feet from the cinder pit.

232 Q. From the south end of the cinder pit that would be probably 400 feet?

A. Yes.

Q. About how many engines, taken the sizes as they come along, can stand there south of the cinder pit?

A. At least four; possibly you could crowd in five.

Q. Can you tell more accurately if you were given the distance in there?

A. I think I could.

Q. I want to first ask you how far from that switch leading to the out-going track will an engine have to stand in order to leave a clearance of the track?

A. Do you mean to leave a proper clearance so one engine can pass another without damage? A. I should imagine about 70 feet from the switch stand or a point of the switch probably 60 feet.

Q. It appears from this map that the distance from the south end of the cinder pit to that switch stand is 320 feet. You would take off about how much of that in order to provide a clearance of 60 feet.

Q. That would leave about 260 feet?

A. Yes sir.

Q. You say that that would provide for about how many engines?

A. Four or possibly five.

Q. As a railroad man with knowledge of the conditions there, what would you say as to whether it was practicable or convenient to permit engines to stand south of the cinder pit so as to block the out-going track and block the street at Third avenue?

A. I don't think it would be practicable at all.

Q. By running a number of engines north of the cinder pit and a part of them south so as not to block that out-going track could they be handled to better advantage?

A. Yes sir.

Q. Where could they be switched if they had to be switched north?

A. Some of them could be run over the table; across the table; north of the table; there is space in there as a rule and then I think there is one stub track there just off the turn table and then there is another track leading around opposite the machine shop coal shed, which they call I suppose the machine shop track. As a rule you can get two or three engines in there.

Q. During that time that they had anywhere from six to seven engines, was the practice following or permitted to block the street on the out-going track or would they put up on these tracks wherever they could be handled?

A. They would put up wherever they could be handled and not block the street, because they would have to get the engine that was going out; it wouldn't be practicable to block the street on account of teams and pedestrians.

Q. I suppose there are times in the day when a large number of engines would make it pretty inconvenient there?

A. As a rule, yes.

Q. What do you say about how many engines would stand in there on the round house track at the worst time?

A. That would all depend on the business. Sometimes as high as ten or twelve, depending entirely on the business.

Q. During the time you were foreman did you know of anyone being disciplined, discharged or suspended for leaving an engine north of the cinder pit in the locality you have testified about?

A. I have not.

Q. During that winter that you were there was there any beaten path along the west side of the rails between that and the shed when the snow was on the ground there?

A. No sir.

Q. What was the condition that prevailed along that place?

A. Generally a bank of snow and ice there.

Q. What about the coal?

A. Of course there was some coal strewn all along.

Q. That would have to be cleaned up by the section men every day?

A. They wouldn't clean it up in the winter time unless there was snow—hardly ever did.

Q. Any more than keep it away from the rails?

A. Yes, that is all.

234 Cross-examination by Att'y MARTIN:

Q. Are you in the employ of the defendant company?

A. I am in the employ of the Northwestern Railway.

Q. What position?

A. Division foreman.

Q. Was it any of your business to examine the bulletin board to ascertain whether or not bulletins were put —?

A. To a certain extent.

Q. Up to the 15th of December, or from the 15th of December, 1910, until you were relieved at Antigo, you never saw any bulletin with reference to where engines should stop?

A. No sir.

Q. And you had during that time examined that board from day to day?

A. Yes sir.

Q. You didn't see anything that forbade them stopping south of the cinder pit track?

A. No sir.

Q. You didn't see any that forbade them stopping on the wrecking track switch?

A. No sir.

Q. You saw no bulletin or order of any kind that undertook to control the stopping of engines on that track at all?

A. No sir.

Q. You say you did see engines stop most any place there along the cinder pit?

A. Yes sir.

Q. You say they stopped as they pleased without any particular regard to north of the cinder pit?

A. Yes sir.

Q. You say they invariably went north of the cinder pit track if that was cleared?

A. Yes sir.

Q. You observed that particularly?

A. No, not particularly.

Q. You observed it with sufficient consciousness to know that it was the fact did you?

A. I know that they stopped there.

Q. You say that they invariably pulled north of the cinder pit?

A. Yes sir.

Q. That is the truth?

A. Yes sir.

Q. Why did they do that?

A. I don't know.

Q. Did you have any control over these engines or their movements or the place where they should stop?

235

A. No sir.

Q. Suppose there were four engines standing north of the cinder pit? and it became necessary to hostle the engine third from the north. How would it be done?

A. Sometimes they would run the engines over the table that were ahead.

Q. What do you mean by the table?

A. The turn table.

Q. Where is it?

A. In the center of the house.

Q. If they run these engines over the turn table they would have to run all four north?

A. Two of them north then they could dispatch the other engine.

Q. How would he get to the cinder pit track?

A. Back the other one up.

Q. Then before they could get to hostile or dispatch the engine in question they would have to move all four?

A. They would move all four engines if they were all coupled together.

Q. I don't care whether all coupled together or ten feet apart? Do you understand we are starting to hostile the third engine from the north of the track and there are four engines on the cinder pit track there is an engine between the one we want and one north of it?

A. They would have to move the four engines.

Q. Then I was right?

A. Yes sir.

Q. If those four engines stopped south of the cinder pit track and there was one north, they could hostile those engines and run them right into the round house if they wanted to without any interference?

A. Yes sir.

Q. As a matter of fact then when these engineers run north of the cinder pit track they would make more work for the hostler?

A. No, a little inconvenient.

Q. You wouldn't be willing to admit it would make more work?

A. Certainly it would be more work.

Q. How long, in your judgment, could an engine stand on the track before it was dead, so you could not move it with its own steam, after it was brought in for the purpose of being hostled? From two to four hours?

A. Yes, may be.

236 Q. May be less?

A. May be less.

Q. You have seen engines standing right there and occupying the switch track repeatedly?

A. No, sir, I won't say repeatedly.

Q. Did you see it more than once?

A. Yes, I have.

Q. Are you a fellow who knows?

A. I don't know.

Q. Why do you say you saw them there at all at any time while you were at work?

A. I didn't say directly that I saw them standing directly on that switch. I said in close vicinity to that switch I have.

Q. I am asking about engines standing on the wrecking switch. I asked you that and you said you saw them standing there most anywhere without regard to the switch. Is that right or do you want to change it?

- A. I have seen engines standing there. *
- Q. Over the switch?
- A. Close to the switch.
- Q. Did you see them standing over the switch?
- A. I cannot say that I saw them standing on the switch directly.
- Q. You cannot say that you didn't?
- A. I cannot say that I didn't.
- Q. Did you give any directions to any of the enginemen that winter to avoid standing on the switch?
- A. No sir.
- Q. Do you remember of seeing ice cleared out of the switch from time to time during the winter?
- A. No sir.
- Q. Did you the winter before?
- A. I wasn't there the winter before.
- Q. Any part of it?
- A. No sir.
- Q. You don't know anything about what sort of a bulletin that was, or whether or not it was up at the time Mr. Gray was hurt?
- A. No sir.

F. DONER, being first duly sworn, testified for and on behalf of the Defendant, as follows:

Direct examination by Att'y SMART:

- Q. What are your initials, Mr. Doner?
- A. E. W.
- Q. You are in the employ of the Northwestern Company?
- A. Yes sir.
- 237 Q. And have been for how long?
- A. 25 years, about.
- Q. What is your present position?
- A. Road foreman of engines.
- Q. Did you hold that position in January, 1911?
- A. Yes sir.
- Q. Where were your headquarters?
- A. Officially at Antigo.
- Q. How long had you held that position at Antigo prior to January, 1911?
- A. About three years.
- Q. As road foreman of engines I understand part of your duty is to go out on the road with engineers on their engines?
- A. Yes.
- Q. And come in with them at the end of their trip?
- A. Yes sir.
- Q. What other duties generally?
- A. My duties, generally speaking, I have charge and supervision of engines and enginemen on all portions of the Ashland division.
- Q. Does that duty take you to the round house from time to time?
- A. To a large extent.

Q. And around the coal shed track?

A. Not particularly.

Q. Not any more than any of the other tracks?

A. No sir.

Q. Where was your office that time?

A. I occupied the same quarters as the division foreman.

Q. That is right near the round house?

A. Part of the store department, north of the round house table.

Q. What is your usual route from your home to your office?

A. From that portion of Antigo in which I live I generally cross from east of the court house up through the yard directly west of the round house.

Q. When you came in on an engine from the road would you come up to the round house direct or not sometimes?

A. Occasionally, yes.

Q. In the dispatch of your duties were you required to read the orders and bulletins on the bulletin board?

A. I was required to read the bulletins that were posted in the general room. As a general thing all bulletins issued in the main office by the superintendent—I was provided with a copy of the same for my files.

238 Q. Did you ever know of any order or bulletin in relation to stopping engines south of the cinder pit?

A. No sir, not to my knowledge.

Q. Did you ever hear of any such order or bulletin for engines to stop south of the cinder pit?

A. Not to my knowledge, no sir.

Q. So far as you observed what was the practice or custom with reference to engines bringing them to the round house track and cinder pit track when the track was clear north of the cinder pit?

A. Speaking from personal experience as engineman running in there and from observation as road foreman, I would say it was rather a matter of individual opinion of the man handling the engine; if the track was clear he would get as close to the round house as he could.

Q. I would like to know whether you had knowledge of some order observed in some way with reference to stopping over the switch track?

A. I had no personal knowledge.

Q. Did you have knowledge of it by hearsay?

Objected to as hearsay. Sustained.

Q. Are you familiar with the different types of engines?

A. Yes sir.

Q. Do you know engine 1066?

A. Yes sir.

Q. What class engine is that?

A. What we designate as "R. 1."

Q. That is one of the largest types?

A. That is the largest type usually operated in that district.

Q. What is the weight in tons or pounds, if you know, of a class R-1 engine without coal or water?

A. Without coal or water, the weight as based on an engine ready for service, in that particular class engine is about 151 tons.

Q. How much would you deduct from that so as to get to the approximate weight of that kind of engine when it comes in from a run?

Q. I would say that an engine arriving at Antigo would weigh approximately 140 tons.

Q. Have you recently measured the clearance of a class "R-1" engine standing on this coal shed track or slightly opposite the coal shed track?

A. Yes sir.

239 Q. About where did that engine stand when you measured it?

A. The engine was on the clinker pit at the time having the fire cleaned; I had occasion to look the engine over for certain work, and in passing around the front of the engine I found that the final point of the engine extended beyond the south end of the coal shed, a distance approximately from between 17 to 18 inches—between the end of the pilot and the outside studding of the coal shed.

Q. You measured that did you?

A. Yes sir.

Q. Is there any substantial variance of the over hang of this class "R" engine?

A. No sir.

Cross-examination by Att'y MARTIN:

Q. I understand that the question of stopping was a question of individual selection?

A. On the part of the engineer.

Q. And that you at no time saw an order or bulletin electing to control the place where an engineer should stop when coming in there?

A. Not to my knowledge, no.

Q. The greatest overhang of one of these engines is how much or how far beyond the rail?

A. I think on this particular engine 29 inches.

Q. Are you not mistaken by about eight inches?

A. I don't think so.

Q. Have you measured it?

A. I have not.

ANTON KRUESKE, being first duly sworn, testified for and on behalf of the Defendant, as follows:

Direct examination by Att'y SMART:

Q. Mr. Krueske, you are in the employ of the Northwestern Company?

A. Yes sir.

Q. And you were at the time Mr. Gray was hurt?

A. Yes sir.

Q. Your job at that time was cinder pit man?

A. Yes sir.

Q. Do you remember that Mr. Gray was hurt?

A. Yes sir.

Q. What time to come on duty that morning? What time did you get to work?

240 A. Six o'clock.

Q. In the morning?

A. Yes sir.

Q. Did Mr. Gray get there before or after you did?

A. Yes sir.

Q. Did he come before or after you came there?

A. I was in the sand house when he came after me to the sand house. I work in the sand house that day.

Q. Did you hostile some engines? Did you take care of some engines that morning?

A. Yes sir.

Q. How many did you take care of after six o'clock, before you went to breakfast?

A. Three.

Q. Do you remember what the last one was?

A. No, I don't know.

Q. Do you remember whether it was a passenger or not?

A. I don't remember that number; she change every day that engine; they take one engine and change right in there to different engine; I don't remember the number.

Q. Did Mr. Gray, that morning, give you some instructions or orders about throwing water on the coal and cinders on the pit?

A. Yes.

Q. When did he first give you those instructions?

A. He come to the sand house and ask me "Anton, go put some water on those cinders she was afire.

Q. When was that? How early in the morning or how late?

A. About fifteen minutes after six; fifteen minutes or a half hour.

Q. Did you do that?

A. Yes sir.

Q. There is a hose there near the cinder pit?

A. Yes.

Q. And a nozzle on the end of it?

A. Yes sir.

Q. How long did you keep putting water on that lime?

A. About five or ten minutes.

Q. How much did you succeed in getting the fire out or getting it wet?

A. I put the water so much I didn't see the fire and that time come an engine on the pit and I knocked that fire out and put some more water on.

Q. How long did you put water on those fresh coals that they brought in?

A. So long as that engine was there. So long as that engine was standing over the cinders.

241 Q. Did you put any more water on there after?

A. I put another engine in the coal shed, clean that up, take same water; I put up another engine and done the same; I don't can stand pouring water all the time; I can't do that work all the time; I can't stand in that gas.

Q. After you got those three engines in did you put any water on after that?

A. From the fourth engine?

Q. Did you put any water on while the fire was being knocked out?

A. Yes sir.

Q. How long?

A. So long as fire was knocked out.

Q. Did you put any water on after the engine was pulled off?

A. Yes, I put more water until I no see fire.

Q. When you quit putting water in did you have the fire all out?

A. Yes sir.

Q. Were the red coals all out?

A. Yes sir.

Q. Did you leave there and go to breakfast?

A. Yes sir.

Q. What time was that?

A. Some time after eight.

Q. How much would you say? 15 or 20 minutes or a half hour?

A. May be something like that, I can't say.

Q. What time did you start to go home?

A. After eight o'clock. May be 20, may be 15, I no remember; I got no watch; I no look.

Q. When you went to breakfast was Mr. Gray around there?

A. No.

Q. Had you seen him go away?

A. Yes sir.

Q. What direction did he go from where you were?

A. I clean that fourth engine.

Q. What route or track or pathway did he go or which direction was he going?

A. He go past on that north end of the coal shed, on the bridge and that way onto south that west side.

Q. He went by that tressle that runs up on the coal shed?

A. Yes.

Q. Was he on the west side of that tressle or the east side?

A. On the west side.

Q. Did you have any talk with him when he went away or not?

A. No.

Q. Do you know how long that was before you went to breakfast?

A. I was at breakfast a half hour, may be more.

242 Q. How long was it before you went to breakfast or left to go away?

A. I clean that fourth engine; take may be half hour.

Q. You don't know.

A. No sir.

Q. How far did you have to go to breakfast?

A. May be about four blocks.

Q. Before you went to breakfast did you notice any engine or train come in from the south?

A. Yes sir.

Q. Which direction did that come from?

A. South.

Q. Did you see it?

A. Yes sir.

Q. Where was it when you saw it?

A. After eight before I go to breakfast.

Q. Where was it when you saw it? Where was this engine and train.

A. It pulled from south into the yard.

Q. On the main track?

A. I don't know; may be on the side track.

Q. It was over east from you?

A. Yes sir.

Q. Did you notice what the number of that engine was or didn't you?

A. Yes sir.

Q. What was the number of that engine?

A. 1066.

Q. Did you hear the bell ringing?

A. Yes sir.

Q. Do you remember that?

A. Yes, I look at it to see what kind of engine come in and I see the number.

Q. What was it called your attention to the train coming in? What made you hear the train at this time? How did you happen to know that train was coming in?

A. I was in the sand house and I finish that sand stuff and I go to the coal shed for coal to put some coal on the stove and I hear the ringing bell.

Q. You heard the bell ringing?

A. Yes, I go to the north end of the sand house, on the other side of the east side, and I look out at it to see what kind of bell is that, may be switch. I like to go get breakfast and I said I would see if it was coming extra; I look and see it is 1066.

Q. Did you go and talk with Mr. Rock then?

A. Then I see that engine come, 1066, and I go to the dispatcher shanty to see Bill Rock, and I open that door and say: "Bill, I go to breakfast. That engine come, 1066, to pull that train; I go now; I come back again." That time I go to have breakfast. I say: "If you no got time you wait for me to help clean that engine." Bill Rock he say: "All right," that is why I go to breakfast.

Q. You didn't see Mr. Gray?

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A. No sir.

Q. Did you go to breakfast right away?

A. Yes, I go.

Q. Was there anyone left there to take care of the cinder pit while you went to breakfast?

A. No sir.

Q. When you came back from breakfast did you see this engine, 1066 again?

A. Yes it was on the pit here.

Q. When you came back from breakfast the engine was on the pit, that is standing over the pit?

A. Yes sir.

Q. Was anybody hostling it or taking care of it?

A. No sir, I seen Bill Rock, that is all.

Q. Anybody else?

A. No sir.

Q. Did you say Mr. Gray was there?

A. No sir.

Q. Did you hear that he had been hurt?

A. Yes, when I come back from breakfast when I come on the cinder pit to help clean that engine, Rock tell me: "Look out, that is the engine that killed Billy Gray. I look at him again and I ask him what he say.

Q. Then you were at breakfast when engine 1066 came in?

A. Yes sir.

Q. Then you weren't there pouring water on the cinder pit?

A. No sir.

Cross-examination by Att'y MARTIN:

Q. What time did you have breakfast that morning?

A. After eight when they got there with that engine.

Q. What time did you come back to work again?

A. I got no time when I got through my breakfast I come right away back. I know that engine was come.

Q. If you hurried right back you probably got back before nine o'clock?

A. No sir.

Q. How far is your house from where you were working?

A. Four blocks.

Q. How long did it take you to eat your breakfast?

A. I am hustling up all I can.

244 Q. You said you started to breakfast about ten minutes after eight. It wouldn't take you more than ten minutes to walk four blocks?

A. I don't know; I could no wait; I got to hustle.

Q. You went right hom-?

A. Yes sir.

Q. Was your breakfast ready?

A. Yes sir.

Q. You sat right down and ate in a hustle?

A. You bet.

Q. You were in a hustle to get back to your work?

A. Yes sir.

Q. When you finished your breakfast did you go right back to work?

A. Yes sir.

Q. Did you hustle back?

A. Yes sir.

Q. How many minutes did it take you to eat your breakfast?

A. Ten minutes, may be some more.

Q. Did it take you more than 15?

A. I cannot tell how long I eat breakfast.

Q. Did it take you more than twenty minutes?

A. Well, I stayed along home about a half hour, that is all.

Q. Then a half to get home and have breakfast and get back. Then you got back to work before nine o'clock?

A. I guess so.

Q. If you left there ten minutes after eight and it took you a half hour or more to eat your breakfast, then you got back about twenty minutes to nine?

A. I guess so.

Q. What did you first do when you got back to work?

A. That engine was in the pit and I help clean that engine.

Q. Are you quite sure about that?

A. Yes sir.

Q. Did you work the afternoon of the day before?

A. Yes sir.

Q. Were you away up town during any part of the afternoon of the day before?

A. No sir. I go up to the cinder pit and go over those cars about ten o'clock I get some coal.

Q. I am speaking of the day before Mr. Gray was hurt? The afternoon of the day before. Did you work all that afternoon?

A. Yes.

Q. On the cinder pit?

A. Yes.

Q. Didn't you go up to town that afternoon?

A. It was pay pay.

245 Q. Did you go up town the day before?

A. Yes sir, I go to get cashed my check.

Q. How long were you up town the day before?

A. May be a half hour; may be three-quarters hour.

Q. You were in a pretty bad condition when you came back the day before?

A. No sir.

Q. Didn't you have to give up work when you came back?

A. No sir.

Q. Didn't you fall down in the cinder pit?

A. No sir.

Q. Now, if that be the fact, didn't Rock pick you up and take you to the sand house?

A. No sir.

Q. Didn't you go to a saloon the day before when you went up-town?

A. Yes sir.

Q. How long did you stay in there?

A. Well I stayed about five or ten minutes.

Q. Had some drinks?

A. Yes.

Q. How many?

A. May be three or four glasses of beer.

Q. You had some whiskey?

A. I don't know; I don't remember when I drink whiskey.

Q. Then the fact is that the next morning you were a little dizzy up here in the head, weren't you?

A. No sir, I feel pretty good.

Q. When you got back to work and started to work you tumbled down in the cinder pit didn't you?

A. No sir.

Q. Do you know Mr. Rock, that young man sitting over there?

A. Yes.

Q. Didn't he pick you up and help you to the sand house?

A. I no remember; I guess not.

Q. Don't you know that he took you up to the sand house and you lay down there?

A. I don't remember.

Q. He may have done that, is that so? He may have done that and you not know it?

A. I don't remember.

Q. When you started home that night you went in a saloon again and drank some more beer and whiskey?

A. After I got through work.

Q. After you got out of the sand house, after six o'clock, you stayed in the saloon how long then?

A. I don't remember; I don't know.

246 Q. Did you stay there until nine or ten o'clock that night?

A. May be I stayed out may be more.

Q. You went home singing?

A. I don't remember.

Q. What time did you go to bed the night before Mr. Gray was hurt?

A. I don't know.

Q. Did you go to bed at all?

A. That is pretty long after one year. I don't remember for sure what time I go to bed.

Q. Wasn't you feeling pretty bum?

A. No, I feel all right, I work all day.

Q. Was this engine cleaned out when you got back from breakfast?

A. That 1066, no sir.

Q. Are you sure it was 1066?

A. Yes, I am sure.

Q. That is the engine that hurt Mr. Gray?

A. That is what I heard.

Q. And it was along about ten or fifteen or twenty minutes to nine?

A. Yes, sir.

Q. Wasn't that engine due to come in at 10:30?

A. I don't know what time. I got no watch; I don't look to see.

Q. You surely had breakfast before ten?

A. Yes, sir.

Q. The record shows the engine that hit Mr. Gray registered in at 10:30? How do you explain that?

A. I don't know.

Q. You don't know how to explain that? If you didn't come in until 10:30 it wasn't on the cinder pit track when you came back from breakfast?

A. Yes, sir.

Q. Then you must have come back from breakfast later than you say. Was it ten o'clock when you got back from breakfast?

A. I guess not.

Q. Did you stay up town to do some drinking?

A. I was not on the town; I go right to work.

Q. Wasn't there any place to get a drink from your house down there?

A. No sir, I go right on the east side across.

Q. Was it ten o'clock when you came back from breakfast? Give me your best judgment. We know you didn't look at a watch. Couldn't you tell about how things would be between eight and half past and nine and as late as ten?

A. Well, I know I had breakfast because I am hungry.

247 Q. Your best judgment is you had breakfast between eight and eight-thirty?

A. Yes sir.

Q. And you went right back to your work?

A. Yes sir.

Q. You say this engine 1066 was on the sand pit at that time?

A. Yes.

Q. How do you know?

A. I seen it coming from south.

Q. Sure it was the same engine?

A. I seen this engine.

Q. When this engine was coming from the south you couldn't see the number on the engine a block away?

A. Yes sir.

Q. How do you remember the number of that engine?

A. I know that number.

Q. What was the number of the engine you cleaned first that morning?

A. I no remember.

Q. Why not?

A. I don't look at that number.

Q. Didn't the first engine you cleaned that morning have a number on it?

A. I no look at it.

Q. Didn't the first engine you cleaned that morning have a number on it?

A. Well, it was no, sure.

Q. Did you see it?

A. May be I saw it; I forget it.

Q. Why do you remember 1066?

A. I remember that why I go to breakfast.

Q. What was the number of the second engine that you cleaned that morning?

A. I don't remember that number.

Q. Did you see it?

A. Yes, I cleaned that.

Q. What was the number on the third engine that you cleaned that morning?

A. It was 768, something like that.

Q. That engine came from the north?

A. Yes.

Q. Wasn't it 687?

A. Some kind of a number.

Q. Can you remember the number on any other engine you cleaned that day except 1066?

A. No.

Q. You cannot?

A. I not look at the number; I done my job.

Q. You saw the number of every engine you cleaned that morning?

A. Yes, it might be I don't look at that number.

Q. How is it you looked at 1066?

A. I look at her when she comes from the south what kind of engine come.

Q. When did Mr. Smart first talk to you about this case?

248 This lawyer sitting over here. When did he first talk to you about this case?

A. I don't understand that.

Q. I am talking to you now. You know I am; we are talking to each other?

A. Yes.

Q. You know Mr. Smart, this man sitting here at the table?

A. Yes.

Q. When did he first talk to you about this case; you and he talked before today?

A. Why, yes.

Q. You saw this man before?

A. They asked me when I got to work; they asked what I done when I got to work.

Q. Did he ask about that engine 1066. He asked about that didn't he?

A. Yes sir.

Q. Isn't that where you got the idea that that engine was number 1066?

A. No sir.

Q. You look at that engine and tell me if this isn't the number that was on that engine, this 1666?

A. No, that was 1066.

Q. Now Mr. Krieska you poured water on those cinders that morning didn't you?

A. Yes sir.

Q. Was there a good many cinders on that pit since the day before?

A. I cleaned that all out and knocked the cinders out and it was as near as chuck full. We leave the cinders on the pit.

Q. You say you cleaned out and knocked the cinders out of three engines that morning before breakfast?

A. Four.

A. Four before you went to breakfast?

A. Yes.

Q. Every time you knocked the cinders out of an engine you poured water on?

A. Yes.

Q. When did you put water on—after you run the engine to the round house?

A. No, when I knocked the fire out I pour right away water on.

Q. You were careful to put water on cinders?

A. Yes sir.

Q. And when you put water on the cinders did it make some steam?

A. Yes, we got steam.

249 Q. And when you got fire you got steam?

A. Yes.

Q. And smoke.

A. Yes.

Q. The cinders smoke if there is live coals on?

A. Yes.

Q. Where did the steam go?

A. Steam go to the west.

Q. Are you sure about that?

A. Yes, I stayed on the west pouring some water and steam come on me.

Q. You don't know how far east it went?

A. No sir.

Q. The steam covered you?

A. Yes sir.

Q. You said something about gas coming up there so it would drive you away or that it was hard for you to work there? Did you smell gas?

A. Yes, when you got some burned coal and drop some water down it makes gas and steam.

Q. How high did the steam and smoke go over that cinder pit?

A. Four or five feet.

Q. Which way was the wind that morning?

A. From east to west.

Q. Came over by you?

A. Yes.

Q. Did it change that morning?

A. I went on the cinder pit on the east side and the west.

Q. Did the wind change that morning?

A. I don't remember; that time when I clean that pit it come from east to west.

Q. How long was it after that accident before anyone asked you anything about the number of the engine? How long after Mr. Gray was hurt was it before someone asked you about the number of this engine?

A. Well, that is why I could have breakfast, then come Bill and tell me.

Q. How long after Mr. Gray was hurt was it before somebody talked to you about the number of the engine?

A. They don't talk nobody from me.

Q. You said you talked to Mr. Smart about this engine and the number?

A. That is what I saw coming from south.

Q. You did talk to somebody about the engine?

A. Yes.

Q. Who talked with you before you came here as witness?

A. Nobody.

Q. When did you talk with Mr. Smart?

A. I talked it before yesterday.

Q. Did you talk with some railroad man up at Antigo about this?

A. Yes.

250 Q. Who was it?

A. I know his name not.

Q. Do you know this man, Mr. Gorman?

A. Yes.

Q. When did you first see him?

A. At the hotel; the Northwestern hotel.

Q. Did you talk with him at the hotel or any place else?

A. In the office.

Q. What office?

A. I don't know what kind of name is; that is the time I saw him then.

Q. Did he ask you about the number of that engine?

A. Yes.

Q. You heard him call that engine 1066?

A. Yes.

Q. You heard Mr. Smart call that engine 1066?

A. Yes.

Q. Then you remembered that was the engine?

A. Yes sir.

Redirect examination by Att'y SMART:

Q. As I understand it when you got back from breakfast you found the engine on the cinder pit?

A. Yes.

Q. Mr. Rock was there?

A. Yes.

Q. Mr. Rock told you Mr. Gray was hurt?

A. Yes.

Q. And when you went to breakfast you saw the engine coming in on the main track?

A. Yes sir.

Q. When you talked with me the first time about this was the night before last up in Mr. Cannon's office was it? You know this man here?

A. Yes.

Q. You know we went up to his office?

A. Yes.

Q. Mr. Cannon was there?

A. Yes.

Q. And some six, seven or eight other men?

A. Yes sir.

Q. We all sat in one big room.

A. Yes sir.

Q. When it came to your turn I asked you to come and sit up near the desk?

A. Yes sir.

Q. What did I say to you about telling your story—what you knew about it?

A. They asked me what I done that morning when I got to work.

Q. Did you tell your story?

A. Yes sir.

Q. Did you tell us that this was engine No. 1066?

251 A. Yes sir. No, you ask me; I no said this, you ask me.

Q. Did I ask if that was engine 1066?

A. No, you asked what kind of engine I no understand very good English.

Q. I asked what you saw there didn't I?

A. Yes sir.

Q. And you went on to tell me your story?

A. Yes sir.

Q. I didn't ask you to say this was engine 1066?

A. No, you asked me what kind of engine. I asked you, that is why I not understand very good English.

Q. Did anybody tell you to come here and testify that this was engine 1066?

A. No.

Q. Do you know who Mr. Martin means by Mr. Gorman?

A. No.

Q. You see this gentleman sitting right by the table with the blue suit on. That is Mr. Gorman. Did you talk to him before you went up to Mr. Cannon's office?

A. No sir.

Q. Did he talk with you since about what you were going to tell?

A. He told me to come up to the office.

Q. Is that all the talk you had?

A. Yes sir.

Q. Then the only one you told your story to was to me up in Mr. Cannon's office?

A. Yes sir.

Q. That was when those six or eight other people were there?

A. Yes.

Q. You told us the same as you told here?

A. Yes.

Recross by Att'y MARTIN:

Q. Did you tell Mr. Smart all you told me here today?

A. Oh, I guess not.

252 JAMES GAGEN, being first duly sworn, on oath, testified for and on behalf of the defendant, as follows:

Direct examination by Att'y SMART:

Q. You live at Antigo?

A. Yes sir.

Q. In February, 1911 were you court reporter?

A. I was.

Q. Of what court?

A. Municipal Court, Antigo, Wisconsin.

Q. How long had you had experience before that in court work?

A. For a number of years before that.

Q. That gave you experience in taking general conversation, questions and answers, in other words?

A. Yes sir.

Q. On February 2nd, 1911, did you, accompanied by Mr. Piersol assistant claim agent of the Northwestern Company, have an interview with the plaintiff, Mr. Gray, at his home?

A. Yes sir.

Q. Where was that interview?

A. At his residence west of the depot, city of Antigo.

Q. Did Mr. Piersol have a conversation with Mr. Gray in your presence at that time?

A. Yes sir.

Q. Were you requested by Mr. Piersol to take that down in short hand?

A. I was.

Q. Did you take it down?

A. I did.

Q. Did you take the questions and answers correctly?

A. I did.

Q. All of them?

A. All of them.

Q. Where was Mr. Gray at that time?

A. In bed.

Q. What was his apparent condition with reference to understanding the questions that were put to him?

- A. I thought that it was good; I think it was good.
Q. Did you keep the original notes of your short hand notes that you took that time?
A. No sir.
Q. Have you them in your possession?
A. They were turned over to the Northwestern.
Q. Are they in existence now?
A. Yes sir.
Q. Have you them in your hands now?
A. I have.
253 Q. They are the original notes taken at that examination?
A. Yes sir.
Q. There have been no changes made?
A. No sir.
Q. Will you read from your notes that you took down at that interview?

Feb. 2, '11.

Examination of WILLIAM GRAY by Mr. PEARSALL:

- Q. What is your name?
A. William.
Q. How old are you?
A. I am 49 years old.
Q. You are a brother to Thomas, the engineer?
A. Yes sir.
Q. What is your occupation?
A. I was engine dispatcher.
Q. How long have you worked for the company?
A. Since 1882.
Q. What was the date of this accident?
A. January 19, 1911.
Q. How long have you been dispatcher here?
A. 10 or 12 years.
Q. At the time of this accident you were an engine dispatcher?
A. Yes sir.
Q. What time of the day did this accident happen?
A. About 11 o'clock in the forenoon I think.
Q. That was in the forenoon?
A. Yes sir.
Q. How did it happen.
A. Well, it seems there was only one man working at the pit. A switch engine from the north came in and I knocked the fire out of her and leaving the pit I told him to take care of the pit; there was a car load of cinders in there and I told him the stringers would get red and some engine might come and go into that pit. It didn't look over safe I thought. I then took this engine to the house. The cinders were all on fire. I told him to wet them down and after I had taken the engine to the house I came back to see if he was doing what I told him and he was doing all right, and all was smoke and steam so I started back to the north end of the clinker pit and had to cross the track to get into my shanty. I

couldn't see anything for steam and smoke, and the first thing I knew I was hit in the face and thrown against the coal shed. I fell between the engine and the shed. I tried to roll towards the shed and I guess I did all right as I got my feet out of the way; I think it was the tank step that struck me in the back; I think that is how I got my ribs broken.

Q. Was it a cold night?

A. Yes sir.

Q. How cold was it?

A. I couldn't tell you; may be ten below, something like that.

Q. This cinder pit is a place to dump cinders out of the engines and the cinders go down between the rails in the middle of the track?

A. Yes sir.

Q. You say you took the engine to the house and then came back to go into your shanty?

A. Yes sir, but I didn't go in.

Q. When you came back was there an engine standing on this pit?

A. No sir.

Q. Where did it stand?

A. There was no engine there at all; the engine must have come in after I was there.

Q. Was the engine coming in at the time it struck you?

A. Yes sir.

Q. Had it got to the pit yet?

A. Yes sir.

Q. It hadn't gone over the pit?

A. Yes sir.

Q. Let us see—the track runs north and south there?

A. Yes, just about.

Q. Were you standing south of the pit?

A. No, sir, I was standing north of the pit.

Q. Which way was this engine moving?

A. It was moving north.

Q. And you were struck north of the pit?

A. Yes sir.

Q. So the engine had passed over the pit?

A. Yes sir.

Q. Had it been standing on the pit, had it stopped there?

A. No sir.

254 Q. Had it passed over the pit on its way to the round house?

A. No sir, it couldn't go into the round house, that was the dispatcher's duty.

Q. Why did it pass over the pit?

A. I don't know.

Q. Had there been water put on this cinder pit which would create steam?

A. Yes sir.

Q. Was the water put in there by your order?

A. Yes sir.

Q. Who put it on?

A. The man who works in the cinder pit.

Q. What is his name?

A. His name is Tony; I don't know how to spell his last name; something like "Cryski", that is the way it sounds.

Q. How long before this accident did he put water on the cinders in the pit?

A. It was about ten or fifteen minutes.

Q. Was there a great deal of smoke and steam caused by the water being on the cinders at the time this accident happened?

A. Yes sir.

Q. This engine you say was moving north?

A. Yes sir.

Q. Head first?

A. Yes sir.

Q. Was the head light on?

A. I couldn't tell on account of the smoke and steam.

Q. Did you hear the bell ringing?

A. No sir.

Q. How far from the cinder pit was it where it struck you?

A. It might have been *been* a car length.

Q. 30 or 40 feet?

A. Yes, about that I think.

Q. Did you know that engine was in the yard?

A. Yes sir.

Q. Did you know she would be coming into the house?

A. Yes sir.

Q. What time did she arrive here in the yard?

A. Perhaps an half hour before.

Q. Did you intend to take care of her?

A. Yes sir.

Q. You don't know whether the head light was burning?

A. No sir.

Q. Could you see it if it had been on through the smoke and steam?

A. No sir, I haven't.

Q. Who picked you up?

A. I got up myself.

Q. What did you do then?

A. I went into the shanty and told Bill Rock to get me some water that I got hit by an engine; he got the water and I started to wash; it seems I was hurt worse than I first thought. As I tried to wash I felt something here, (places his hand to his scalp) and I looked in the glass and saw that my scalp was cut open, so I got a piece of waste to put to my face and started home. I thought I might faint if I stayed there and I thought I had better try to get home myself.

Q. You went home all alone?

A. Yes sir.

Q. How far did that engine go after it struck you before it stopped?

A. Between 200 and 300 feet.

Q. What made him stop then—did he know you were injured?

A. No sir.

Q. What did he stop for?

A. He stopped to clear the ice house.

Q. He didn't know you were injured at all?

A. No sir.

Q. I suppose he couldn't see you any more than you could see him on account of the steam and smoke?

A. No sir.

Q. Who is taking care of you?

A. Doctors Donohoe & Donohoe.

Q. They are related to you are they not?

A. Yes, cousins.

Q. What are your injuries?

A. Three ribs broken, fracture of the skull, scalp wound and shoulder badly hurt.

Q. Are you feeling pretty good now, Mr. Gray?

A. Yes sir, as good as could be expected.

Cross-examination by Att'y MARTIN:

Q. Who was with you when these minutes were taken?

A. Mr. Piersol.

Q. Who is Mr. Piersol?

A. Assistant claim agent of the Northwestern Company.

Q. He wanted to get a statement of the accident?

A. I believe so.

255 Q. And you turned these notes over to him?

A. No, I sent them down to the claim agent, Richards, afterwards.

Q. And he had them until recently?

A. I presume he had.

Q. You saw Mr. Gray was in bed at the time?

A. Yes.

Q. His head all bandaged up?

A. I believe so; I wouldn't be sure of it. I know he was in bed.

Q. Anyone present besides you and Mr. Pearsall and Mr. Gray?

A. Mrs. Gray was present.

Q. I suppose there was a good deal of conversation had before you began to take this conversation?

A. I think if I remember right there was some.

Q. General talk?

A. Yes sir.

Q. And when Pearsall got the lay of the land he began to ask questions.

A. I think he simply asked how he felt.

Q. Did Mr. Pearsall take part in the conversation?

A. Not in regard to the accident.

Q. Are you the fellow who engaged him in the conversation?

A. Before taking the questions; no. I say that I don't think Mr. Pearsall said much about the accident before we began taking notes.

Q. You say there was some general talk?

A. Yes sir.

Q. If I understand you right, you said there was some general conversation. What are you getting nervous for? Were you nervous when you took that statement?

A. I don't think so.

Q. Were your nerves so under control that you think you took it correctly?

A. I think it is correct.

Q. I understand you to say that there was a general conversation about the accident before you began taking it down?

A. I think there was a little.

Q. Did Mr. Pearsall take part in that conversation, if there was any?

A. If there was any it was Mr. Pearsall and Mr. and Mrs. Gray, those three, I had nothing to say.

256 F. B. PIERSOL, being first duly sworn, testified for and on behalf of the Defendant.

Direct examination by Att'y SMART:

Q. You are assistant claim agent for the Chicago Northwestern?

A. One of them.

Q. You were on February 2, 1911?

A. Yes sir.

Q. You heard the testimony of Mr. Gagen, who just left the stand?

A. Yes sir.

Q. Were you at Antigo about that time and had an interview with the plaintiff?

A. Yes sir.

Q. Mr. Gagen went there with you at your request?

A. Yes sir.

Q. For the purpose of taking the conversation down?

A. Yes sir.

Q. What was Mr. Gray's apparent condition with reference to understanding the questions put to him and making answers?

A. He appeared to be perfectly rational and appeared to understand all I said to him and made what appeared to me intelligent answers.

Q. You didn't make any memoranda of that interview?

A. No, I had Mr. Gagen do that.

Q. You have heard read Mr. Gagen's notes have you?

A. Yes sir.

Q. Did you attempt to fasten in your mind the questions or answers that took place there that time?

A. No sir.

Cross-examination by Att'y MARTIN:

Q. What did you say you were?

A. Assistant general claim agent for Northwestern Company.

Q. For how long have you been claim agent?

A. In the neighborhood of 23 years.

Q. Where do you live?

A. Ravenswood, Chicago.

Q. How long have you lived there?

A. Well, I went there to Ravenswood to live in 1888; then I went to Omaha for three years, then came back. Since that time I have been away again ten months but my family are at Ravenswood.

257 R. W. LYMAN, being first duly sworn, testified for and on behalf of the defendant, as follows:

Direct examination by Att'y EDW. SMART:

Q. Mr. Lyman, you are in the employ of the Chicago Northwestern Railway?

A. Yes sir.

Q. As fireman?

A. Yes sir.

Q. Were you in that position on and prior to January 19, 1911?

A. Yes sir.

Q. How long were you running in and out of Antigo at that time?

A. Well I don't remember just how long but at that time I was working between Antigo and Rhinelander.

Q. How long had you been in service in a general way prior to that accident to Mr. Gray?

A. I have been in service of the Northwestern since the third of May, 1903.

Q. Were you there during the summer and fall of 1910, that is the summer and fall previous to Mr. Gray's accident?

A. Yes, I think I was.

Q. Were you with Engineer Duggan who came in on No. 114 the morning of the accident?

A. Yes, according to the arrival register.

Q. Train 114 is the train that comes down in the morning from Rhinelander?

A. Yes sir.

Q. During the period you were running there, prior to Mr. Gray's accident, what was the custom or practice with reference to engine-men leaving their engines north of the cinder pit when the track was clear north of the cinder pit?

A. When the track was clear they most always runs their engine as close to the round house as they could possibly get them.

Q. What was the reason to the exception to that rule?

A. If the track was blocked making it impossible to get in there north of the cinder pit.

Q. Did you ever see or hear or know of any order to the contrary?

- A. No sir, never prohibited us running north of the pit.
- 258 Q. Do you know of any particular order to not stand engines in any particular place north of the cinder pit?
- A. Yes, I have recollection of a bulletin being posted to keep engines away from the wrecking track switch to keep it from freezing up.
- Q. Did you see that?
- A. I did.
- Q. This practice you referred to was that practiced by you?
- A. Yes.
- Q. Was that practice followed by you with the knowledge of your superior officers around there?
- A. I think it was.
- Q. Have you any particular recollection in regard to where you left your engine the morning in question?
- A. No sir, not any whatever.

Cross-examination by Att'y MARTIN:

- Q. When did you first see that bulletin that you speak of?
- A. I don't know just exactly the date of it.
- Q. Do you remember the month?
- A. No sir, I cannot say as to that.
- Q. Was it in the winter of 1909 and 1910?
- A. I won't be positive; I couldn't say just when it was posted there.
- Q. Well, of course there was the same reason for keeping that switch track clear in the winter of 1909 and 1910 as 1910 and 1911?
- A. I think there was.
- Q. Was it usual to see bulletins giving orders to trainmen during that winter?
- A. This bulletin was the only one that I remember. Just when it was I can't say.
- Q. You may know whether it was there two or three winters?
- A. I just have only a recollection of seeing it.
- Q. You can't tell what month?
- A. No sir.
- Q. You are not able to tell it to us word for word?
- A. No sir, I can't repeat it word for word as it was.
- Q. Tell us who signed it?
- A. I think it was signed by Mr. Armstrong. I am not sure whether it was his name in full or only his initials.
- Q. Do you know to whom it was addressed?
- A. I am not positive.
- Q. And you wouldn't know where you left your engine that morning when you came in?
- A. No sir, I have no recollection whatever.
- 259 Q. Don't know whether you stopped 100 feet from the round house or whether you went nearer?
- A. No sir, I don't remember.
- Q. Who did you say was your engineer?
- A. Mr. Duggan.

Q. Were you in at all on the day that Mr. Gray got hurt?

A. I got in that morning at 7:18 on 114.

Q. That was your arrival time at Antigo at the depot?

A. Yes sir.

JOSEPH POSS, being first duly sworn, testified for and on behalf of the defendant, as follows:

Direct examination by Att'y SMART:

The plaintiff gives notice that we are going to object to the examination of more than six witnesses on this point.

By the COURT: We will fix it at eight if satisfactory to both parties

By Att'y SMART: We will limit the witnesses to eight on any particular point where the testimony is corroborative, as provided by the ruling of the Court.

Q. Mr. Poss you are in the employ of the Northwestern Road?

A. Yes sir.

Q. In what position?

A. Engineer.

Q. And you were such at the time Mr. Gray was injured?

A. I was running a switch engine nights in the Antigo yards.

Q. How long had you been working around that round house previous to January, 1911?

A. I worked around there for eleven years more or less all the time during that eleven years.

Q. Were you working there during the year previous to Mr. Gray's injury?

A. Yes sir.

260 Q. You would have to take your engine in at the end of your day?

A. Yes sir.

Q. Oftener?

A. On the switch engines we bring it in twice during our service of ten hours.

Q. To be replenished with coal and water?

A. Yes sir.

Q. During the time I refer to, previous to Mr. Gray's injury, do you know what the practice was, of yourself and others, about bringing your engines in there in reference to stopping north of the cinder pit when the way was clear?

A. The practice was when it was clear to take the engines as near the round house as possible. During noon hours it was immaterial because he had lunch with him right on the engine.

Q. That practice was followed by you?

A. Yes sir.

Q. Did you ever know of any one being fined, suspended or punished for following that practice?

A. No sir.

Q. Did you ever hear of any order or bulletin contrary to that?

A. I never seen a bulletin designating where engines should be stopped.

Cross-examination by Att'y MARTIN:

Q. You never saw any bulletin of any kind controlling the location of engines?

A. No sir, only there was a bulletin limiting the location so far as the wrecker track switch was concerned.

Q. When did you see that?

A. Either in February, 1909 or the early part of March, 1909. No, that would be 1910. I was on the Galena division and it was soon after I got back the bulletin was posted.

Q. When did you get back?

A. The 15th of February. Then it was between the 15th of February, I should say, and the middle of March, that that bulletin was posted.

Q. Of what year?

A. 1910.

Q. Wasn't it during the winter of 1911?

A. No sir, 1910, that is the only winter I run in there.

Q. So it was up there during that part of your winter?

A. Yes sir.

Q. Are you sure about that?

A. Yes, I am pretty sure.

Q. Nobody else seems to have seen it that time?

A. That may be.

261 Q. Was it where others could see the bulletin—exposed to view?

A. For a few days may be—a couple of days.

Q. Did you ever see a bulletin of that kind on there before or since? The kind you referred to?

A. No sir.

Q. Do you know how that bulletin read?

A. I couldn't give it word for word every word of it.

Q. The thing that fastened itself in your mind was that engines should stop so as not to drop water on the wrecker switch and let it freeze there.

A. Yes sir.

Q. If they were so directed to stop south of the cinder switch it would have the same effect?

A. It would.

Q. Were you handling a switch engine the time Mr. Gray got hurt?

A. I got in on a switch engine that morning. I handled a switch engine may be two years previous to that time.

Q. You had been handling road engines before?

A. Most of the time.

Q. So it was a matter of selection to the individual man as to where he would stop his engine on that track?

A. It was when the track was clear.

Q. When it was clear north of the cinder pit they had to stop south of the cinder pit?

A. If they didn't have space the engines would go further up near the round house; they could run up behind.

Q. The whole track wouldn't be clear. What would be the object of running up there?

A. The object was to get as near to the round house as possible in order to get off and get through the work at the round house and get home.

Q. And the hostler would have to move the engine back to the cinder pit?

A. Yes, if he wanted to dispatch it right away.

Q. That is what he had to do?

A. He could do it different ways if he wanted to.

Q. If you pulled an engine up to the round house north of the cinder pit he would have to take it back to the pit?

A. He could back it up, or switch it on some other track and come in from the south.

Q. They didn't practice that?

A. They permitted the dispatcher to.

262 Q. They permitted the dispatcher to run around the yard with an engine just for fun?

A. Not for fun, no.

L. M. LINDSAU, being first duly sworn, testified for and on behalf of the Defendant, as follows:

Direct examination by Att'y SMART:

Q. You are in the employ of the Chicago Northwestern Company?

A. Yes.

Q. And you were in January, 1911?

A. Yes sir.

Q. What work were you doing at that time?

A. Firing.

Q. Were you firing out of Antigo?

A. Yes sir.

Q. How long have you been running out of Antigo prior to January, 1911?

A. About a year before.

Q. Now, do you know what the practice was with reference to leaving engines on the coal shed track north of the cinder pit when the track was clear?

A. If the track was clear we would run up as far to the round house as we could get.

Q. Was that practice and custom followed by all?

A. Most all done that I think.

Q. Done by yourself and others?

A. Yes sir.

Q. Was that done openly with the knowledge of your superintendent?

A. Yes sir.

Q. Did you ever hear of anybody being fined, suspended or fired for doing it?

A. No sir.

Q. Were you in the habit of reading bulletins that were put up

on the bulletin board that might govern the running of trains and engines?

A. Yes sir.

Q. Did you ever hear or know of any order or bulletin that prohibited the running of engines on this track north of the cinder pit when the track was clear?

A. I heard of a bulletin, yes.

263 Q. What was the bulletin you heard of?

A. About freezing up the switch engine stand where they get the wrecker out.

Q. State what that bulletin was if you remember. Did you see it?

A. Yes sir.

Q. What was that bulletin?

A. That engines left over the switch would let water run on it and freeze the switch up, because the wrecking outfit was there.

Q. Is that the bulletin you refer to that you saw?

A. Yes sir, I seen several others around there.

Q. Did you ever see or hear or know of a bulletin that provided for the men stopping their engines south of the cinder pit?

A. No sir.

Q. Did you ever follow any such bulletin or order?

A. No sir.

Cross-examination by Att'y MARTIN:

Q. You said something about seeing that bulletin and several more about not stopping?

A. I only seen one about that.

Q. What do you mean by seeing several others?

A. Different bulletins about different rules.

Q. When did you first see this particular bulletin about the engines stopping south of the pit so as to avoid throwing water on the wrecking track switch and letting it freeze?

A. Some time in 1910.

Q. Are you sure it was in 1910?

A. Yes sir.

Q. Wasn't it in December, 1909?

A. I haven't seen it there that time.

Q. How do you know?

A. Because I know I didn't. Because I wasn't there that time.

Q. When did you commence to work there?

A. 1910.

Q. When?

A. About the third month.

Q. About in March, then?

A. Yes.

Q. Was it there when you first went there to work?

A. I didn't notice the time I noticed it first.

Q. That was in March, 1910, when you started to work?

A. Yes.

264 Q. Did you examine the bulletin?

A. Not right away.

Q. When did you notice it more fully?

A. I don't know.

Q. The last witness on the stand said this bulletin was taken down after day or two or three; he also says that it was up there in 1910?

A. That must be there in 1910.

Q. What is the fact, did they leave this up five or six or seven months? Was that covered up with others?

A. Yes.

Q. Some of the witness- say they are filed away?

A. They do that after they are old.

Q. How long did they leave that up there for the men to see, more than two or three days?

A. Something like that.

Q. More than two or three weeks?

A. No.

Q. How long was this bulletin up there to your knowledge?

A. I don't know how long but I know it was there when I was there.

Q. Did this bulletin read that engines stopping north of the cinder pit and near the wrecking track switch would cause water to fall upon the switch and ice would form and that thereafter they would have to stop south of the cinder pit?

A. No sir, it didn't say that.

Q. Can you tell us how it read?

A. It said that engines if stopping on the switch—

Q. I want it word for word.

A. I don't know just how that bulletin did read word for word.

Q. Have you been back here and heard the other witnesses testify?

A. Yes sir.

Q. You didn't hear about the bulletin that had been up about south of the pit?

A. No sir.

Q. Didn't you hear it talked of?

A. No sir.

Q. Didn't you hear Mr. Kane say something about it?

A. No sir.

Q. Did you ever talk with him about it?

A. No sir.

Q. Some of the engines did stop south of the cinder pit?

A. If there were engines ahead.

265 Q. And if there were no other engines ahead they stopped south of the cinder pit?

A. Not as I know of.

Q. You don't know what they all did?

A. I don't know.

Q. Do you know what engineers did when they came in on a run when you were out?

A. I have been there at times and seen them come.

Q. Was that bulletin covered there by others when you first saw it?

A. I believe it was; I wouldn't say for sure.

Q. Was it in typewriting?

A. No sir.

Q. And you couldn't sit down and write it out for us?

A. No sir.

DAN JONES, being first duly sworn, testified for and on behalf of the Defendant, as follows:

Direct examination by Att'y SMART:

Q. Mr. Jones you are in the employ of the Northwestern Company?

A. Yes sir.

Q. As what?

A. Fireman.

Q. Were you in the employ of the company in January, 1911?

A. Yes.

Q. As locomotive fireman?

A. Yes sir.

Q. Had been for how long?

A. About two and a half years.

Q. During the fall and winter and during the year previous to January, 1911, were you running in and out of Antigo?

A. Yes sir.

Q. Previous to the time Mr. Gray was injured did you do any dispatching?

A. Yes sir.

Q. When?

A. At different times along through the winter and through the summer.

Q. To fill in?

A. Yes sir.

Q. Do you know what the custom of practice of the engineers and firemen was with reference to leaving engines on that track prior to the time Mr. Gray was hurt?

A. If the track was clear they used to go up to the round house.

Q. How generally was that practice followed?

A. They always followed it.

Q. Did you follow that?

A. Yes sir.

266 Q. Was it done by you with the knowledge of your superior officers?

A. Yes sir.

Q. Were you ever fined, suspended or discharged for that?

A. No.

Cross-examination by Att'y MARTIN:

Q. Did you ever know of any order or bulletin on the subject at all?

A. I know of a bulletin about engines not stopping on the wrecker track switch.

Q. When did you first see that?

A. I don't remember.

Q. Do you know about when the first time was that you ever saw it?

A. No sir.

Q. Can you sit down and write it out for us in substance?

A. No not exactly.

Q. You can't tell what year it was you saw that?

A. No sir.

Q. Can you tell how long it was up there before you saw it?

A. No sir.

Q. Can you tell how long it was up there after you saw it?

A. No.

Q. You say you can't give it to us word for word?

A. No, I don't remember just how it was worded.

Q. No particular reason why you should?

A. No sir.

H. R. STRAW, being first duly sworn, testified for and on behalf of the Defendant, as follows:

Direct examination by Att'y SMART:

Q. Mr. Straw you are in the employ of the Northwestern Company?

A. Yes sir.

Q. And were in January, 1911?

A. I was.

Q. In what capacity?

A. Locomotive engineer.

Q. Up to January 6th, 1911, where were you running?

A. In and out of Antigo.

Q. After that where were you? As I recall it you told me you stopped running out of there?

A. After January 6th, I was changed from there to
267 Monico Junction; I was running out of there for a period of six weeks.

Q. Were you running a part of the previous year in and out of Antigo?

A. I was most of the time.

Q. Do you know what the custom or practice was of engineers and fireman with reference to where they would put up their engines on the coal shed track at Antigo when they brought them in to be dispatched?

A. It was the custom if the coal shed track was clear to run down as far as you could get to clear the out-going track.

Q. Where would that be with reference to the water tank?

A. Opposite the water tank; the out going track from the round house right at the corner.

Q. That would be north of the cinder pit?

A. Yes sir.

Q. How general was that practice? Was it followed universally by you?

A. Yes sir.

Q. Did you ever know of anybody that followed that practice having been suspended, fined or discharged for doing that?

A. I have no knowledge of it.

Q. So far as you are aware was that done with the knowledge of your superiors?

A. It was.

Q. Did you ever know or hear of any order or bulletin to the contrary?

A. Nothing except there was one issued as to leaving engines on the wrecking track switch.

Cross-examination by Att'y MARTIN:

Q. When did you first see that one?

A. I couldn't say the day. Two years ago I think; in the summer of 1910 somewhere around there.

Q. Was it in January?

A. Well it occurred in the winter, it might have been either December or January, I couldn't say.

Q. You mean in that winter of 1909 and 1910?

A. Yes sir.

Q. Do you know that because of it?

A. No sir. They are covered up with other bulletins sometimes.

Q. Do you know how long it remained on the bulletin board?

A. I have no knowledge.

268 Q. And you couldn't sit down and write it out?

A. No sir.

Q. Was there any special reason why an engineer should go north of the cinder pit with his engine?

A. Nothing, except his own convenience.

PETER VAN DERAA, being first duly sworn, testified for and on behalf of the Defendant, as follows:

Direct examination by Att'y SMART:

Q. You were in the employ of the Northwestern Company in January, 1911?

A. Yes sir.

Q. What were you doing?

A. Locomotive fireman.

Q. Had you been at that work for sometime previous to that?

A. Yes sir.

Q. For how long?

A. Six years.

Q. Were you during the previous year running in and out of Antigo?

A. Yes sir.

Q. Do you know what the custom or practice was during that time previous to January, 1911, with reference to where the engineer and fireman would leave their engines to be dispatched on the coal shed track in Antigo?

A. It was always the custom if the track was clear north of the cinder pit to run them down as near to the round house as possible, so we wouldn't have to walk and carry our stuff to the round house; it was more convenient.

Q. How long was that practice and custom followed?

A. Always when there wasn't any engine in there.

Q. You followed that practice yourself?

A. Yes sir.

Q. Was that done with the knowledge of your superintendent?

A. Yes sir.

Q. Were you, yourself, or did you ever know of anybody being fined, suspended, reprimanded or discharged for following that practice?

A. No sir.

269 Q. Did you ever hear or know of any order or bulletin to the contrary of that practice?

A. No sir.

Cross-examination by Att'y MARTIN:

Q. Then, as I understand you, you went down there north of the cinder pit for your own personal convenience?

A. Yes sir.

By Att'y SMART: I want to say that we have several more engineers and firemen on this point here present in court and I offer to prove by them the same facts testified to by the last six witnesses on this point and request an opportunity for doing so.

By Att'y MARTIN: To which request the plaintiff objects because at the time — the question counsel said he would be satisfied with four more of those witnesses which made the number larger than usually permitted by the court.

By Att'y SMART: We did consent and I now think counsel has made unfair remarks before the jury and take exception to his remarks and ask for a ruling by the Court.

By the COURT: The court understood counsel to agree on the number of witnesses that were to testify on this point and that number has not been exceeded.

By Att'y MARTIN: The plaintiff withdraws the remark having misunderstood counsel.

270 Mr. MOHLE recalled by the defendant.

Q. You are as I understand it a foreman an Antigo?

A. Yes sir.

Q. And at the time of this accident you were foreman at the round house?

A. Yes sir.

Q. And you are familiar with the use of these tracks around the round house both north and south?

A. Yes sir.

Q. I note on this blue print we have here that there are several tracks extending north of the round house. I want to ask

you what occasion there would be from time to time during each day to use the coal shed track and the cinder pit track by engines coming clear through and not stopping for the purpose of being dispatched. The different purposes for which an engine would go through there on that track to perform services up in beyond there.

A. We had occasion to have engines go through there to pick up cars from repair tracks; in case an engine was going out on the out-going track, which would block that track, the switch engine would have to go in on the wrecker very often; it occurred that an engineer having work on his engine would instead of stopping at the south end of the pit would come up to the round house in order to bring the foreman's attention to the work and show him some defective part of the locomotive; it has occurred where he was obliged to for they occasionally use the out-going track for unloading timbers and other material, and we had to quite often use that track for unloading sand and kindling wood; in these cases we would have to run engines through over the cinder pit track.

Q. What about repairing that out going track at times when it needed repairs?

A. There were times when the section — were making repairs on that track and at that time it would be tied up; and used to ballast the snow plow, and we used to take sand from the sand house, we would fill the snow plow and attach it to the car and block it that way.

271 Q. And the engines out going would have to take sand and water on that track?

A. Yes sir.

Q. Would they go up there to set the valves on the engines?

A. Yes sir, that is the only track there that is good for that purpose of adjusting valves.

Q. What did they have to do to set those valves?

Objected to as immaterial. Objection sustained.

Q. You have stated different ways in which the outgoing track would be blocked. Wouldn't the switch engines have to go up over this track to get water at the water tank when they were in service?

A. Yes sir.

Q. What about storage of perishables in the round house?

A. We often stored potatoes, apples and things like that and the switch engine would have to go down and get them as the case might be.

Cross-examination by Att'y MARTIN:

Q. I suppose that it is a fact that this particular track was used by engines and crews going in either direction whenever there was any occasion to use it?

A. Which track was that?

Q. The one leading to the round house over the cinder pit? The one on which Mr. Gray was injured—it was used going in either direction whenever you had any occasion to use it?

A. Yes, just like any other track.

Q. It was in general use?

A. Yes sir.

Q. And an engine crew was likely to be going north or south as the case might be?

A. Yes sir.

WILLIAM ROCK recalled by the Defendant.

Examined by Att'y SMART:

Q. Mr. Rock, I believe you testified when Mr. Martin called you to the stand, you didn't hear either an engine coming or a bell ringing?

272 A. No I didn't hear an engine going by.

Q. Have you got a stove in your shanty?

A. Yes sir.

Q. In cold weather is that stove kept running?

A. Yes.

Q. Do you know whether you were reading at the time this engine went by or not?

A. I may have been reading.

Q. What did you have in there to read?

A. Northwestern Bulletin.

Q. Is that some railroad magazine?

A. That is a Northwestern magazine you might call it; get it every month.

Q. Something you are supposed to get and read.

A. I don't know whether we are supposed to read it; I do, though.

Q. Relates to railroad service and positions?

A. Yes sir.

Q. Do you remember whether or not you knew that Mr. Gray left the yard that morning some time?

A. Yes sir.

Q. What do you know about that?

A. Just as I was going into the shanty he was putting on his coat going up to the depot to get his check. He told me he was going to get his check.

Q. Have you any recollection as to about what time that was?

A. It was shortly after eight; may be a quarter after.

Q. Did you stay in the shanty from that time on to the time he was hurt?

A. Yes sir.

Q. When did you next see Mr. Gray?

A. After he got hurt. When he got back to the shanty after being hurt.

Q. You didn't see him in the meantime?

A. No sir.

Q. Did you see the train come in from which engine 1066 was finally brought to the coal shed track?

A. I didn't see it come in at the coal shed but I seen and heard it come in on its run.

Q. You are positive you heard it come in?

A. Yes sir.

Q. What track was it on when you heard it?

A. It was coming in on one of the leads in the yard off the main line.

Q. Which direction would that be from your shanty?

A. Just east.

Q. I suppose the general lines would show on this blue print here.

A. I think so.

Q. Do you know where the conductor registered when he pulled in?

A. In on this side track—up in the north yard.

273 Q. What was the custom with reference to engines being taken up there?

A. They always took the conductor up there to the north yard so he wouldn't have to walk back.

Q. How far would that be north of that switch track?

A. From Third Avenue up there, I should judge would be about one mile.

Q. A Mile up and a mile back?

A. Yes sir.

Q. Do you remember of Krieska coming into your shanty and speaking to you before he went to breakfast?

A. Yes sir.

Q. What, to your recollection did he say?

A. He says "If there is anything comes in, he says, just wait until I get back from breakfast and I will help you on the engine if anything comes in."

Q. Can you recall if he said there was an engine in or not or if there was one coming in?

A. I say so far as I remember it he says if anything does come in.

Q. Then did you see Krieska after that until after the accident?

A. I seen him after the accident.

Q. As I understand your testimony Gray came into your shanty with his face injured?

A. Yes sir.

Q. Did you do anything towards helping him?

A. I got him a pail of water that he asked for.

Q. Have you any idea how much time you spent on that before you went to the engine?

A. Between five and ten minutes at the most.

Q. After you got through with Mr. Gray what did you do about the engine?

A. I went up to where the engine was and run it back to the pit.

Q. Where did you go to get the pail of water?

A. Down to the cinder pit.

Q. To that hose down there?

A. Yes sir.

Q. Did you see Krieska around there at all?

A. No sir, I didn't.

Q. Where was the engine when you got it?

A. At the wood pile.

Q. Did you run the engine back yourself?

A. Yes sir.

Q. Alone?

A. Yes sir.

Q. Where did you run it to?

A. Just at the north end of the pit. Just so as I could
274 clean out the ash pan.

Q. When you run the engine to the north end of the pit and stopped there did you see Krieska there?

A. No sir.

Q. After you got the engine there what did you do?

A. Opened up the pan and took a bar and started to poke the cinders out.

Q. What was the first thing you did after opening up the pan?

Objected to as immaterial. Overruled.

A. I took the bar and poked the cinders out that is inside the pan.

Q. Doesn't some one have to work some levers or something inside of the cab?

Objected to as immaterial. Question withdrawn.

Q. How long had you been working at that before you saw Mr. Krieska?

A. About five minutes.

Q. Did he then appear on the scene where you were?

A. Yes sir.

Q. Afterward assisted you in cleaning out the engine?

A. Yes sir.

Q. Did you notice which direction he came from?

A. I should judge he came from the west part of the shed; I wouldn't be sure.

Q. Did you have some talk with him about the fact that Gray was injured?

A. I told him that is the engine that struck Gray.

Q. Have you any recollection as to about what time it was Mr. Gray appeared at the shanty injured?

A. I should judge it would be about a quarter after ten.

Mr. LONG recalled by the defendant.

Examined by Att'y SMART:

Q. Mr. Long, since yesterday you have been to the coal shed and cinder pit at Antigo and made some measurements?

A. Yes sir.

Q. You made these yourself?

A. Yes sir.

Q. Exhibit 7 is what?

A. Exhibit 7 is a sketch of the in-going track in Antigo—the

275 engine house taken across the track and in line with the south side of the blow off box, opposite the coal shed. The sketch shows the east line of the coal shed at that point and the west end of the blow off box, also the track.

Q. How did it happen you didn't make that cross section measurement of the shanty?

A. I mis-understood you on that; I thought you wanted the measurement line at the blow off box, although I took the measurement down regarding that data—I didn't take any actual measurements opposite the shanty.

Q. At that point what is the distance from the outer tip of the studding to the coal shed and the inside tip of the coal shed.

A. Three feet eleven and one-half inches.

Q. The measurements you gave yesterday on the blue print is the distance between the shed and this rail; was that taken from the inside or the outside of the rail?

A. That was taken from the outside.

Q. That was three feet nine inches?

A. I believe so.

Q. Is defendant's Exhibit "8" another sketch made by you at the same time.

A. Yes sir.

Q. Does that show the position of the cinder pit with reference to the south east corner of the coal shed, and also the position of the stone wall running north of the north east corner of the cinder pit at the depressed track?

A. Yes, it doesn't show the full length of the cinder pit; the north end and south east corner of the coal shed.

Q. Right at the exact southeast corner of the coal shed what is the distance there between the corner of the shed on the inside to the west wall of that?

A. Four feet three and one-half inches.

Q. What do you refer to?

A. I refer to this extra southeast corner, or the southeast post of the shed; that would be a point closer to the track at that corner; that would be the edge of the studding or post as I call it.

Q. That would show that right at that corner opposite it was about four inches more each way?

A. Up opposite the blow-off box, yes.

276 Q. What is there in the formation of the shed there to cause that?

A. Why, the building is old and the line of the shed is more or less wavering. I took particular note of that yesterday.

Q. Can you tell how far the north end of the wall running along the depressed track is from this point at the southeast corner of the coal shed?

A. It is 12 feet 5 inches.

By Att'y MARTIN:

Q. That is where the sunken track projects 12 feet some inches?

A. Yes sir.

By Att'y SMART:

Q. Did you measure outside between that pile of ties at the north end of that wall to the east rail of the track?

A. Yes sir.

Q. What is that distance?

A. Five feet nine inches to the nearest point of the pile of ties and timbers.

Q. About what is the width of the top of those rails?

A. About two and a quarter inches.

By Att'y MARTIN:

Q. The request I made of you yesterday was to get the distance from the west rail opposite the shanty to the wall of the coal shed, and also studding and you say you misunderstood that?

A. I understood when I got back this morning that was what I was supposed to do but I had the blow off box in mind.

Q. In view of the fact you were there on the ground, can you tell us whether the distance between the east edge of the studding and the west rail of the track opposite the shanty is about the same as it is opposite the blow-off box?

A. I know it is about the same because I took several measurements to see how these distances would run.

Q. To substantiate the same?

A. Yes sir.

277 By Att'y SMART:

Q. Did you measure this studding?

A. That is 3 x 10; every 12 feet there is a 6 x 10 post.

Q. Are the studding all the same so far as you observed?

A. Yes sir, what I call the studding are the same; there is a six by twelve post, then four feet 3 x 10 studding; then four feet and 3 x 10 studding, and another four feet 6 x 10 posts; that is studding and spaces being spaces about four feet long in line with the shed as shown on this sketch.

Q. Are these studding four feet apart?

A. Yes sir, about four feet; there are 12 foot panels between the posts proper and in between the posts are two studding, making the two studding 3 x 10. I measured them to see.

Mr. KRUSE recalled by the defendant.

Examined by Att'y SMART:

Q. Mr. Kruse, do you know whether the bell was ringing on engine 1066 when you pulled in on that track and over the cinder pit that morning in question?

A. Yes sir.

Q. Was there anything about that bell that you recall particularly?

A. Yes, there was.

Q. What was there that happened about that that makes you remember it?

A. When we stopped down by the tank the engineer got off and left the bell ringing.

Q. What did you do?

A. I shut the bell off.

Q. Where did you have to go to shut the bell off?

A. Across to the engineer's side.

Q. Across the cab?

A. Yes sir.

Q. Did you have to turn a valve?

A. Yes sir.

Q. What time that day did you learn that he claimed it was your engine struck Mr. Gray?

A. I didn't learn it until along towards evening.

Q. Along about evening you say?

A. Yes sir.

278 Q. Did you have some talk with Mr. Kane about this bell business?

A. I think it was the next day he was there.

Q. Was the fact with reference to shutting off the bell discussed between you that time?

A. Yes sir.

Q. You remember that distinctly, do you?

A. Yes sir.

Q. When was that bell turned on with reference to the Antigo yards? and with reference to that trip?

A. About a mile south of Antigo I should judge.

Q. Were you running right along with Kane then?

A. Yes sir.

Q. How long had you been running with him as his fireman?

A. Perhaps two weeks.

Q. During those two weeks what was the custom or practice with reference to turning on the automatic bell ringer, how near in coming to the city limits?

Objected to as immaterial. Sustained. Exception.

Q. When you approached that cinder pit from the south where were you in the engine?

A. On my seat box.

Q. Looking in which direction?

A. Looking north out of the window.

Q. Were you in a position where you could see a man standing where the hose was or see a man use the hose there on the cinder pit?

A. If I didn't get too close to the pit I could see him.

Q. Approaching to the pit?

A. Yes sir.

Q. How far back would you have to be?

A. 25 or 30 feet.

Q. When you got within 25 or 30 feet what would cut off your vision?

A. Two bumpers; running board.

Q. Was Krieska or anybody else pouring water on those cinders as you approached that cinder pit from the south?

A. I didn't see him.

Q. Were you looking where you could see him if he was down there?

A. Yes sir.

Q. And you say you didn't see him?

A. No sir.

279 Cross-examination by Att'y MARTIN:

Q. You were not looking for Krieska or any man who would be in that position pouring water on those cinders for the reason a man that was there would be in no way likely to get injured by your engine?

A. I don't understand what you mean.

Q. You weren't looking for Krieska or any other man who would be in a position throwing water on the cinders?

A. The fact is I didn't see anybody at all there.

Q. Then what you mean to say is there wasn't anybody at all at the pit?

A. I didn't see anybody.

Q. If a man stood in the position a man would stand pouring water on the cinders he would be enveloped by steam and you could pass up there and probably not see him at all?

A. If he was enveloped by steam, no, I couldn't.

Q. Isn't it true that it was down in the yard, after the engine came in, and not up on this track, that Mr. Kane got off and left the bell ringing and you shut off the air?

A. No, I don't remember that.

Q. Don't you remember that when Mr. Kane pulled into the yard and got off his engine down there in the yard, he got off and left the bell ringing and you stepped over and shut off the air and stopped the bell ringing?

A. No sir, I don't remember that.

Q. Your recollection is that it was up on this track?

A. It is.

Q. That bell sometimes gets out of order and doesn't ring. An automatic bell will get out of order from a number of causes and not ring?

A. Yes sir.

Q. Didn't you in talking with Mr. Kane after this accident, say to him that he got off the engine down in the yard and left the bell ringing and that you shut it off?

A. Not to my knowledge.

Q. The thing of it was you shut the air off down in the yard after you pulled in and stopped?

A. Not as I know.

Q. You didn't stop your train after coming to the end of your run in the yard and leave the bell ringing?

A. Yes sir.

Q. You did?

A. Yes sir.

280 Q. You don't ordinarily do that do you?

A. At times we do and sometimes we don't.

Q. Sometimes you do shut it off, then, when you get in?

A. Yes sir.

Q. As a matter of fact didn't Kane step off his engine when he got into the yard and stop down there?

A. I don't think he did—not in the yard.

Q. He stepped off his engine before he got off this track?

A. He might be at the north end.

Q. When I say yard I mean any place in the vicinity except on this track. The point I want to get is whether or not he didn't stop at some point before he got in this cinder pit—didn't he get off his engine?

A. Yes sir.

Q. And when he did get off this engine he left the bell ringing and didn't shut it off at that point?

A. Not up in the yard.

Q. Are you quite sure?

A. I am pretty sure.

Q. Might you be mistaken?

A. I don't remember it that way.

Q. You remember it largely from the fact that you thought you did shut it off in the yard?

A. I remember shutting it off at the round house.

By Att'y SMART:

Q. Was the bell ringer out of repair at that time?

A. No sir.

By Att'y MARTIN:

Q. It does get out of repair and stops ringing. The cold weather might stop it?

A. If it is not properly oiled.

Q. You don't call that out of repair?

A. No sir.

Q. The cold weather will cause it not to ring?

A. I have never seen cold weather stop it unless it is out of repair.

281 HENRY MILHARN, being first duly sworn, testified for and on behalf of the defendant, as follows:

Direct examination by Att'y SMART:

Q. Mr. Milharn, where do you live?

A. At Antigo, Wisconsin.

Q. Your home is at Antigo?

A. Yes sir.

Q. Are you employed by the Chicago Northwestern Company?

A. Yes sir.

Q. You were on the engine on the Chicago Northwestern Company on the day that Mr. Gray was hurt?

A. Yes sir.

Q. In what capacity?

A. As student fireman.

Q. In other words you were simply at that time learning the business?

A. Yes sir.

Q. How many days had you been student fireman before the day of the accident?

A. One day.

Q. Was that on the outgoing trip or same trip?

A. Some other trip—that was my second.

Q. Where did you start from that morning to make the trip?

A. From Green Bay.

Q. As student fireman in the engine there where did you ride or sit?

A. In the cab.

Q. Where?

A. When the fireman was firing I sat on the seat box.

Q. Did you have to fire some yourself?

A. Yes sir.

Q. Do you remember running in on this coal shed track at the time it is claimed this accident happened?

A. Yes sir.

— What were you doing at that time?

A. On the deck taking off my overalls.

Q. Do you remember whether or not the automatic bell ringer was turned off coming into the city of Antigo?

A. I remember Mr. Kane turned it on coming into Antigo.

Q. What part of the town?

A. Coming in down on the south end of the town.

Q. Do you remember whether or not that bell was ringing when you run in on this coal shed track?

A. I don't remember.

Q. You have no recollection either one way or the other?

A. No sir.

282 Q. Didn't you know Mr. Gray was hurt when you went up there?

A. No sir.

Q. When did you first learn of the accident?

A. About five o'clock that afternoon.

Cross-examination by Att'y MARTIN:

Q. Mr. Kane pulled his engine some place down in the yard to get off before running into this yard over the cinder pit?

A. I don't remember.

Q. Wasn't there a place in the north yard, south yard, and middle yard where engines pulled in and stopped when coming in with their freight trains?

A. Yes sir.

Q. Didn't he pull his train up on this track?

A. I don't remember.

Q. You mean you don't remember whether he got off or not any place?

A. That is it.

Mr. DONER, being first duly sworn, testified for and on behalf of the Defendant.

Direct examination by Att'y SMART:

Q. Mr. Donard what is the length of the class "R" engine?

A. 67½ feet—that goes from the rear of the tender to the nose of the pilot.

By Att'y MARTIN:

Q. What is the length of smaller engines?

A. They run from 36 feet up to a double "R"; the smallest engine we have is 36 feet.

Q. What is the length of the smallest road engine?

A. 44 feet 4 inches.

Q. The majority of your engines there are of the smaller type?

A. No, sir, our freight engines are all of the larger type.

Q. That is the average size in use?

A. No sir, our freight engines are all of a large type.

Q. And the passenger?

A. A large class of passenger engines is practically 67 feet 3½ inches.

By Att'y SMART:

Q. What would be the average length, taking engines as they come and go on that coal shed track?

A. I would say about sixty feet.

283 Mr. MOHLE, recalled by the defendant.

Examined by Att'y SMART:

Q. Have you served on engines in the capacity of running engines at all?

A. I have handled engines around the yard.

Q. Are you familiar with the noise engines make in running around on this coal shed track?

A. Yes sir.

Q. You have observed them particularly?

A. Yes sir.

Q. You are familiar with this class "R" engine are you?

A. Yes sir.

Q. In a general way know its make up and its weight?

A. Yes sir.

Q. Do you know this engine 1066?

A. Yes, I remember it.

Q. As I understand at the time of the accident to Mr. Gray you were round house foreman and had charge of this engine?

A. Yes sir.

Q. You are familiar with the way that track is constructed over at the coal shed?

A. Yes sir.

Q. Familiar with the construction of the cinder pit?

A. Yes sir.

Q. And the support to the rails of the cinder pit?

A. Yes sir.

Q. What kind of foundation is there to the track outside the cinder pits?

A. Just ordinary earth foundation.

Q. At the time of the accident was the ground frozen along in this region?

A. Yes sir.

Q. You have had experience in using what we call light engines, that is, engines without trains of this class "R" type, running across the cinder pit north past the coal shed for the purpose of being dispatched?

A. Yes sir.

Q. And you have seen and heard them run there both with steam and drifting?

A. Yes sir.

Q. As I understand it when an engine is drifting it is not puffing?

A. Yes sir.

Q. And at that time there is no necessity for steam escaping from the cylinder cocks and no steam coming up through the steam cocks?

A. No.

Q. When you shut steam off in that way does it produce any other noise but that of the cylinders?

A. If an engine is drifting without working steam there is a vacuum formed and the piston working steam there is a vacuum formed and the piston travels back and forth inside the cylinder going throughout that vacuum. There is a relief valve placed on each end of the steam chest and through this relief valve the air is sucked into the cylinder and causes a loud sucking noise of air.

Q. That is true of each cylinder?

A. Yes, on both sides of the engine.

Q. And these alternate?

A. They alternate.

Q. Somewhat in the same manner of the action that forces steam out of the cylinder cocks?

A. Yes, in the same manner.

Q. How does that noise of the air rushing into this vacuum compare with the steam escaping from the cylinder cocks?

A. I should say about the same; might not be quite as loud as the cylinder cocks.

Q. Could you hear or distinguish for some distance that action of the relief valve?

A. Yes sir.

Q. What distance can you distinguish that?

A. I should say about two or three car lengths, possibly more than that under other conditions.

Q. In the winter time is there any difference in the opening between the rail joints than in the summer time?

A. I would not suppose so.

Q. Don't you know?

A. I know the contraction of the rails leaves a larger opening between the rails.

Q. How would the noise of wheels or large engines going over these joints in the winter time, compare with what it would be in the summer?

A. There would be more noise necessarily in winter.

Q. What is the effect of freezing up the ground in winter, taking the sponginess out of the ground, what effect would that have on the engines passing over the rails?

A. It would make more noise than on solid ground.

Q. That rails cannot so easily yield to the joints under those circumstances?

A. No sir.

Q. You know of this hose and nozzle that is there at the cinder pit for the purpose of throwing water on the hot coals and
285 cinders?

A. Yes sir.

Q. About what size is the opening in the end of that nozzle?

A. About five-eighths of an inch in diameter.

Q. You took particular notice of that did you?

A. Yes sir.

Q. That is the same nozzle that is there now as at the time of the accident?

A. Yes sir.

Q. Is that coal shed that is there now the same as at the time of the accident?

A. Yes sir.

Q. Has there been any change in the whole surface?

A. No.

Q. Position of the shed the same and the blow-off box?

A. Yes sir.

Q. And the stone part of the wall around the cinder pit?

A. Yes.

Q. And that pile of ties at the north end of the depressed track?

A. Yes sir, those are the same.

Q. The railing that appears in one of these photographs, was that there at the time of the accident or was that put there since?

A. I think that was put on about three months ago.

Q. Did you on June 27, 1912, cause a test to be made for the purpose of ascertaining the noise that a class "R" engine would make going up this track at a point opposite the shanty?

A. Yes sir.

Q. What kind of a day was that?

A. It was a clear day.

Q. Which direction was the wind in?

A. I think from the south, that general direction.

Q. Before this test was made did you have some fresh hot coals and cinders put on the cinder pit?

A. Yes sir.

Q. From how many engines did they dump any there before this test was made?

A. Two engines.

Q. Right at the same place?

A. Yes sir.

Q. How were they when dumped there?

A. Red hot fresh cinders.

Q. Who was there at the time this test was made?

A. Do you mean every one?

Q. Who was there for the purpose of seeing this test made?

A. You and Mr. Gorman and Mr. Quigley.

286 Q. Who, outside of those connected with the Northwestern Company?

A. Mr. Briggs and Mr. Anderson.

Q. Two business men there at the request of the railroad company.

A. Yes sir.

Q. What did you do in regard to the test—take an engine?

A. Yes, I took an engine that had just come in from the road.

Q. What was that?

A. A class "R" engine.

Q. Do you remember what the number was?

A. 1374 I believe.

Q. Was it the same style and type as 1066?

A. Yes sir.

Q. And about the same weight?

A. Yes sir.

Q. What other noise does an engine make coming in on that track at that place, outside of the action of the air rushing into the vacuum of the cylinder and the pounding of the wheels on the rail joints?

A. The side rods and main rods will rattle quite a bit, and the machinery in general will pound when opened and shut off.

Q. Is that true of engine 1066 as it was at that time?

A. Yes, she was in pretty loose shape.

Q. It is true of all this class "R" engines?

A. Yes, they will pound.

Q. How far did you take this engine down the track before you started it up the track?

A. I took it down to a point just opposite to Third Avenue.

Q. You run it up that track beyond the shanty district twice in the presence of Mr. Briggs and Mr. Anderson and others.

A. Yes sir.

Q. Where were they stationed at the time of the making of this run?

A. Standing up in front of the dispatcher's shanty.

Q. Did you run it with steam and without steam?

A. Yes sir, I was working steam a little.

Q. Much more than enough to make an engine work with steam or considerable more?

A. Just about enough to keep her going.

Q. You have had experience so that you can tell about how fast you were running engines.

A. Yes sir.

Q. Can you tell us just about how fast you run this engine on these two trips?

A. Yes sir.

287 Q. About how fast?

A. About eight miles an hour.

Q. Up to about what point did you go with reference to the cinder pit?

A. I must have been about 100 feet south of it I think on the first trip.

Q. And on the second?

A. I run her a little faster on the second trip on account of shutting her off so she would slow down, so I probably got her going a little faster before I got to the pit.

Q. On both trips from the time you got there by the cinder pit, up until you got over there by the shanty, what time did you make?

A. Eight miles an hour.

Q. You don't remember making any observation yourself?

A. No sir.

Q. You didn't try to?

A. No sir.

Q. Was there a man pouring water on these hot coals when you went up by there with this identical hose and nozzle that has been testified to?

A. The hose might have been changed but it is the same size though. The old hose might have been worn out.

Q. What size hose?

A. It is a half inch hose.

Q. That hose and nozzle was attached there from the city water works and the pressure the same?

A. Yes sir.

Q. This was along about what time in the afternoon?

A. About four o'clock.

Q. The second trip did you run with or without steam?

A. I worked steam up a portion of the way and then shut it off—to get started.

Q. I mean going over the cinder pit and running north, were you running without steam?

A. Without steam, yes.

Q. As I understand you started on this trip down about where the engine would have started in coming off the main track?

A. Yes sir.

Cross-examination by Att'y MARTIN:

Q. Well, did you hear anything?

A. I don't understand what you mean.

Q. Did you hear any noise?

A. At what time.

Q. While you were doing this work?

A. Yes, I heard the noise of the engine.

288 Q. Did you hear the noise of the water on the coals?

A. No sir.

Q. Did you listen?

A. No sir.

Q. Who threw the water on the cinders?

A. One of the pit men.

Q. Do you know who he is?

A. Yes sir.

Q. Is he here?

A. No sir.

Q. Did he spray it or let it drop off?

A. I paid no attention to that.

Q. All you know is that there were men stationed there to watch?

A. Yes sir.

Q. You don't know whether the water was being poured on dead coals or live coals?

A. On live coals.

Q. You don't know whether he kept throwing a little and stopped or what he did?

A. No sir.

Q. You can arrange that nozzle so as to throw water through a large space so it will fall over a large area or you can throw the water so the nozzle will spray it?

A. Yes sir.

Q. It is one of these nozzles whereby the water can be sprayed? You don't know whether he arranged it so this water would spread out or whether he threw it in one stream?

A. No sir.

Q. You don't mean to tell this jury that an engine passing over a track in winter makes as much noise as it does in summer?

A. Yes, I should say about the same. I think the snow might effect it.

Q. Think it would act like a blanket and muddle the sound?

A. Yes sir.

Q. Have you got the same vibration?

A. About the same.

Q. When an engine is passing over the rail it vibrates?

A. Yes sir.

Q. At least sound doesn't vibrate?

A. No sir.

Q. You think the snow might deaden the sound?

A. Yes sir to a certain extent.

Q. You never tried to ascertain what the extent was?

A. No sir.

Q. As a matter of fact an engine when drifting doesn't make any particular noise aside from the chug chug sound?

A. No sir.

Q. What noise is there aside from this sucking sound when an engine is drifting?

A. Rattling of the rods.

Q. Do you run engines that have rods that rattle?

A. Yes sir.

Q. Then some engines would make more noise than others?

A. Yes sir.

Q. Do you mean to say that you send your engines out with rods that rattle?

A. Yes sir.

289 Q. What rods rattle? I say the word rattles just now as you said it. What rods in your engine rattle?

A. The side rods and the main rods.

Q. The main drive rods rattle then do they?

A. Yes sir.

Q. You know what the meaning of the word rattle is?

A. Yes sir.

Q. Does it rattle more when it is drifting than when it is working steam?

A. Yes sir.

Q. What makes it rattle more?

A. The pressure of the steam on the cylinder forcing the rod up and down against the pinions.

Q. Did your engine make more noise this day when it was drifting than when working steam?

A. I think it did.

Q. You knew what this test was being made for?

A. Yes sir.

Q. You had Mr. Smart there and knew what he wanted?

A. Yes sir.

Q. You knew he wanted to get out the fact that you could hear that engine?

A. Yes sir.

Q. Will you swear that your engine was making more noise when drifting than when working steam?

A. Yes sir.

Q. Do you include the exhaust and the noise made by the steam and smoke and cylinder cocks and all that or just the noise made by the rods that rattle?

A. All of it and the air pumping.

Q. Do you think this jury never saw an engine working steam or drifting?

A. They may have.

Q. When you speak of this engine running on this day of the test did this engine work steam?

A. Just the same as any engine would work steam until we got down north of the road.

Q. Do you mean to tell this court and jury that this engine drifted 18 miles around there—made more noise than when you were working steam?

A. Yes sir.

Q. You do?

A. Yes sir.

Q. Do you think it would happen any place else?

A. It might.

Q. Was there a cloud of steam and smoke there that day?

A. There was a cloud of steam, yes.

Q. Was it so it obscured the view of this man situated or stationed at the shanty?

290 A. No sir.

Q. Was it so it obscured the vision of any man there?

A. No sir.

Q. How much of a cloud of steam and smoke was there at that time?

A. It rose up ten feet I should say.

Q. How wide was it? Did it rise from over the entire area of the cinder pit or only some part of it?

A. Just between the rails.

Q. Was it carried up north between the coal shed and shanty?

A. To a certain extent.

Q. Did it obscure your view in any way?

A. No sir.

Q. Was it being swished along by the wind?

A. It was slightly.

Q. I suppose that one sound can be obscured by another?

A. Yes.

Q. And the distance you would hear that engine would depend on the direction of the wind?

A. Yes sir.

Q. And upon the condition of the track to some extent?

A. Yes.

Q. If your rails were not spiked firmly to sound ties, if the track was not well ballasted or defective spiking to retain the rails and ties to the track, an engine would make more noise coming over that track than if the track was in good condition?

A. Yes sir.

Q. What kind of a track have you along there?

A. A good firm track.

Q. Any ties not firm?

A. I couldn't say.

Q. It was pretty firm in the winter when it was frozen solid?

A. It was firm on account of—

Q. I don't care for your reason; it was firmer then than last June?

A. Yes sir.

Q. The rails would wobble more last June than any time when frozen solid?

A. Yes sir.

Q. How much of a covering of snow and ice was there upon that track between the rails and ties and about the end- of the rails and ties on the day when Mr. Gray was hurt?

A. Oh, about a couple of inches.

Q. Was part of that solid ice?

A. I think it was snow.

Q. Was it packed hard?

A. I can't remember but I think it was. Q. I can't remember but I think it was packed from people walking on it.

291 Q. And this space in the rails between the ties was that filled up with snow?

A. From time to time right near the rail.

Q. Where was it filled up—from the bottom of the rail?

A. It probably was.

Q. That is a likely condition in winter?

A. Yes sir.

Q. That snow and ice, taken alone as the case may be, fills all the space between the rails and the space under the rails to the bottom of the rails and to the end of the ties?

A. There is an earth ballast there that holds the snow.

Q. The snow was on top of the ballast?

A. Yes sir.

Q. You say in June the track was pretty loose?

A. Yes sir.

Q. Could you hear the noise of the water falling on the cinders if you tried to or did the noise of your engine obscure that?

A. The noise of the engine obscured it.

Q. So far as you are concerned the noise of the engine as you went along there would obscure the noise of the water falling upon the live coals?

A. Yes sir.

By Att'y SMART:

Q. You were on the track the morning of the accident?

A. Yes.

Q. Was there any snow on top of the rails?

A. None on top of the rails.

CHARLES H. GORMAN, being first duly sworn, testified for and on behalf of the Defendant.

Direct examination by Att'y SMART:

Q. You are in the employ of the Chicago Northwestern Company?

A. I am.

Q. You are my assistant in the state of Wisconsin?

A. Yes sir.

Q. You heard the testimony of Mr. Mohle?

A. I did, most of it.

Q. Do you know the test that he referred to made in Antigo in June 2, 1912?

292 A. I do.

Q. What part did you take with reference to the water?

A. I had the hose put in position; saw that the valve was entirely open as far as possible to admit of as much water being poured on the flames as could be. I had the hose direct on the hottest portion of the fire so there would be a direct current.

Q. Turned it on full force?

A. Turned in on full force.

Q. Turned it on so as to make the loudest possible noise?

A. The loudest noise that could be made.

Q. Did this while this engine was making both trips from the cinder pit to the coal shed?

A. Both times, yes.

By Att'y MARTIN, cross-examination:

Q. Did you do that for the purpose of coming here to testify?

A. I didn't.

Q. Do you make a practice of acting both as witness and attorney for the company?

A. This is the first time I have.

Q. Going to do it again?

A. Depends on circumstances.

Q. How long have you been attorney for this company?

A. Three years.

By Att'y SMART: I want to take exception to the insinuating remarks made by counsel and object to him making such statements in presence of the jury and court and wish to make a statement: All I want to say is that I inadvertently let the witness go home that was holding the hose because of a family matter, and left no one else here to testify and was compelled to put Mr. Gorman on because I had no one else here who could.

R. M. Briggs, being first duly sworn, testified for and on behalf of the defendant.

Direct examination by Att'y Smart:

293 R. M. BRIGGS, being first duly sworn, testified for and on behalf of the Defendant, as follows:

Direct examination by Att'y SMART:

Q. Mr. Briggs you live at Antigo?

A. Yes sir.

Q. You are in business there?

A. Yes sir.

Q. Have lived there a good many years?

A. Yes sir, about 25.

Q. You have no connection with the Chicago & Northwestern Co.?

A. No sir, none whatever.

Q. Were you on June 27, 1912, requested to go down near the coal shed of the Northwestern Co. at Antigo to make observation as to the sound made by an engine passing over the track and water being thrown on the cinders?

A. Yes.

Q. And did you so attend?

A. I did.

Q. And Mr. A. P. Anderson was there with you?

A. Yes sir.

Q. And Mr. Charles Adkins?

A. Yes sir.

Q. At the time the test started and while the two tests were made?

A. Yes sir.

Q. The engine passed over the cinder pit two different times?

A. Yes sir.

Q. At the time the engine started to make the run where were you and Mr. Adkins stationed?

A. Near a small shanty.

Q. About sixty feet north of the pit?

A. Yes sir.

Q. What things were you requested to observe during the run made by the engine?

A. Observe the noise made by the water as it was being poured on the cinders and as the engine approached to note the noise made by the approaching engine.

Q. You were also requested to make an observation of the noise of the water being thrown on the cinders before the engine started as you stood there?

A. Yes sir.

Q. Did you make observation of the noise of that water being thrown on the cinders before the engine started?

A. Yes sir.

Q. Was this noise perceptible up at the shanty?

A. Yes sir.

294 Q. You could hear it distinctly?

A. Yes sir.

Q. Just describe the kind of noise it made?

A. The sound that any water would make thrown on the same substance—hissing sound as it struck the hot coals.

Q. Did you watch the engine as it came up over the track?

A. Yes sir.

Q. The engine was coming right along the track?

A. Yes sir.

Q. You didn't attempt to make any judgment of the speed?

A. No sir. I was told it was about eight miles an hour; I am no judge of locomotive speed.

Q. That test was made with steam and without steam?

A. With steam.

Q. The second trip was without steam?

A. The second was without steam, yes.

Q. Apparently about the same rate of speed?

A. Yes sir.

Q. Did it run by you where you stood?

A. Yes sir.

Q. Describe what noise that engine made going up that track and over the rail?

A. Just the noise of the working of an engine of that description would make going over a steel rail. A person could hear it distinctly from where I stood.

Q. Was there an alternating sound of the valves and cylinder cocks?

A. Yes sir.

Q. Was it plainly heard?

A. It was perceptible from where I stood when it went by and approaching.

Q. Any other noise?

A. When it was drifting just the noise of the weight of the engine and the clicking sound.

Q. Any rattling about the engine?

A. I wouldn't call it very much rattling; there was a noise of the alternating rods and such as that, the machinery.

Q. What effect did that noise of the engine have upon the water being poured on the cinders?

A. You couldn't hear the water after the engine got over the pit.

Cross-examination by Att'y MARTIN:

Q. This one noise obscured the other?

A. Yes sir.

295 Q. So that whether you could hear the engine or not would depend on whether or not a greater noise was present?

A. Yes sir.

Q. If there was a greater noise being made by the engine than by the water you wouldn't hear the water being poured on those coals?

A. No sir.

Q. In this case the engine made a greater noise than the water on the cinders and you didn't hear the water?

A. Yes sir.

Q. Couldn't you see it?

A. I could.

Q. There was that little vapor from the water being thrown on the cinders, and you could see the engine approaching?

A. Yes sir.

Q. You do admit you could see the body of the engine approaching without any effort?

A. Yes sir.

Q. Where was the wind?

A. In the south.

Q. Very much wind?

A. Not much.

Q. Calm day?

A. Yes sir.

Q. Clear day?

A. Yes sir.

Q. You had been standing some distance north of the shanty. How much further?

A. No sir, I didn't go beyond there.

Q. Where did you first hear the engine?

A. Heard the sound as it came onto the cinder pit.

Q. You could hear it before it got to the cinder pit could you?

A. Yes sir.

Q. Was there exhaust steam at any time on the second trip?

A. It puffed smoke through the smoke stack. The first time there was no smoke being discharged; the second time but very little.

Q. And less noise the second time than the first?

A. That is the way it seemed.

Q. The second time they were drifting?

A. Yes sir.

Redirect by Att'y SMART:

Q. The noise of the puffing of steam was less the second time?

A. Certainly.

Q. When was the noise of the relief valve made?

A. That was the second time when the engine was floating.

296 A. P. ANDERSON, being first duly sworn, testified for and on behalf of the Defendant, as follows:

Direct examination by Att'y SMART:

Q. You live at Antigo, Wisconsin?

A. Yes sir.

Q. What is your business there?

A. Retail meat business.

Q. You have no connection with the Northwestern Company?

A. No.

Q. Were you requested to go with Mr. Briggs and Mr. Adkins on June 27, 1912, to witness a test in the yards at Antigo?

A. Yes sir.

Q. You heard the testimony of Mr. Mohle?

A. Yes sir.

Q. And Mr. Briggs?

A. Yes sir.

Q. And you were present at that test?

A. Yes sir.

Q. Did you observe that engine coming over the track in question making those trips?

A. Yes sir.

Q. Where did you stand prepared to make the observation during those trips?

A. At the dispatcher's shanty.

Q. Opposite the door of his shanty?

A. Yes sir.

Q. And right at the edge of the track?

A. Yes sir.

Q. Did you listen before the engine started to make this trip to the sound of the water being poured on the cinder pit?

A. Yes sir.

Q. What did you see then?

A. A little steam rising—it wasn't very dark.

Q. What sound?

A. Just as though you pour water on something hot. Wasn't very much noise.

Q. While the engine was making both trips did you listen and observe the effect of the noise of the engine upon the noise of the water? Did you listen to that?

A. Yes sir.

Q. And listened to how far you could hear that engine coming?

A. Yes sir.

Q. How far could you hear that engine coming on both trips?

A. A little ways on the other side of the cinder pit.

Q. As I understand it the first trip the engine puffed and the second trip didn't?

A. Yes.

297 Q. Describe what noise you heard when it came in over the second trip without puffing?

A. The noise of the rods and the releasing of the air make quite a bit of noise and the cracking of the rails when it went over the joints.

Q. When the wheels went over the joints?

A. Yes sir.

Q. What effect did that have on the noise of the water being poured on the hot cinders?

A. Why, you couldn't hear that, after the engine got to about that place.

Q. When the engine was running on steam and puffing what noise was there?

A. Just the same as any engine would make that was puffing.

Q. Was the relief valve working when the engine was puffing?

A. No.

Q. Couldn't you hear that distinctly?

A. Yes sir.

Q. Would it obscure the noise of the water on the coals when it was running at the time it was puffing?

A. Do you mean so that we couldn't hear the water on the coals? No, we couldn't hear the water.

Cross-examination by Att'y MARTIN:

Q. Do you know what a relief valve is on an engine?

A. No, I do not.

Q. Do you know where it is located?

A. No.

Q. Would you know a relief valve from a hind quarter of beef?

A. I'm sure you can't fool me on that.

Q. You know that you said the relief valve was making a noise?

A. I did.

Q. Do you know all you knew is that it was some part of the engine making that noise? You don't know where the relief valve is?

A. Up on the side of the engine I think.

Q. The rails were pretty loose and making a noise?

A. Yes.

Q. Do you know whether they loosened up the rails for this test?

A. I wouldn't imagine so.

Q. Where were you stationed?

A. Near the dispatcher's shanty.

298 Q. On the east side of the track?

A. Yes sir.

Q. On the tie?

A. Why not on the tie when this test was being made, I didn't stand there.

Q. Where did the other men stand?

A. They stayed there with us.

Q. Did you have to stand on the west side of the track between the coal shed and the west rail while the engine was passing by?

A. Why, I walked over while the engine was starting.

Q. Did you, any time while the engine was passing by you while making the test, walk up between the west side to the west rail? Don't you get my idea?

A. I don't altogether.

Q. Were you there for the purpose of listening?

A. Yes sir.

Q. At any time while this engine was passing up from the cinder pit north either the first time or the second time, were you in between the west rail and the coal shed?

A. Yes sir.

Q. Listening?

A. We weren't listening at that time. The engine was standing still.

Q. I am after the time while the engine was moving along north. Were you then in between the west rail and the coal shed?

A. I was between the engine and the coal shed but I don't know whether she was moving out.

Q. The time when you listened for a noise when the test was being made you were standing on the east side of the rail near the shanty?

A. Yes sir.

Q. The engine that moved without working steam made less noise than the engine that worked steam?

A. I can't say as to that; I heard them both.

Q. I want to get at the idea of which one made the least noise?

A. That I couldn't say.

Q. You ship meat through the Northwestern?

A. A little.

Q. Do you know how they came to pick you out and bring you down to see that test?

A. No sir, I don't know only that I happened to be.

Q. You don't know what use they were making of the
299 yard and track around there at that time?

A. No sir.

Q. Didn't pay any attention to it?

A. No.

Q. Was the engine visible to you at all times?

A. Yes sir.

Q. No cloud of steam or smoke or vapor?

A. No sir.

Q. Of course it wasn't cold?

A. No sir.

Redirect by Att'y SMART:

Q. Describe the steam that came up from these hot coals?

A. There wasn't a great deal of steam.

Q. You were standing nearly between the engine passing on that track and the coal shed?

Objected to as immaterial. Sustained. Exception.

Mr. ARMSTRONG re-called by the Defendant.

Q. Mr. Armstrong you are familiar with the character and kind of business done by the Chicago & Northwestern Railway Company on your division at Antigo?

A. Yes sir.

Q. Can you state whether or not that line of road in that division is constantly engaged in interstate traffic.

Objected to as immaterial and further that the witness is not competent to testify as to inter state traffic.

Q. Do you know what is meant by inter state traffic?

Objected to as immaterial and not competent to testify, and not competent under the pleadings and is incompetent, immaterial and irrelevant.

Objection overruled. Exception.

Q. Do you know?

A. I believe I do, yes. It is the exchange of business between two states.

Q. At and prior to the plaintiff's accident was the Northwestern road its trains, engines and employees engaged in hauling
300 cars of freight continuously between Michigan, and state of Wisconsin and points in Illinois and state of Wisconsin?

A. Yes sir.

Moved to have the answer struck out. Motion granted.

Objected to because it does not appear what employees are meant, and further objection is immaterial, incompetent and irrelevant as to whether their engines, their employees and their trains and

crews may have or might have been in any respect engaged in interstate traffic, and that the only thing material, if at all, would be the use made of this particular engine, that is the engine on which the plaintiff was hostler.

By the COURT: Objection sustained. The only question is as to this engine as I can see it; the engine on which this person was engaged at the time.

By Att'y MARTIN: My objection goes to all of these questions. 1st. Because the witness is not competent. 2nd. Because the testimony is not admissible under the pleadings. And 3rd. The testimony itself is incompetent, irrelevant and immaterial.

Q. Were engines that were being hostled at this round house at the time in question making trips from Antigo to Ashland?

A. Yes.

Q. Did they go through Michigan?

A. Yes sir.

Q. And at the same time were engines and trains making connection with the Watersmeet branch?

A. Yes sir.

Q. The engines running south wouldn't run outside the state?

A. No sir.

Q. Do these going and coming from the south handling refrigerator cars come from Chicago?

A. Yes sir.

Q. The dispatcher is under the jurisdiction of the foreman of the round house?

A. Yes sir.

Q. And Mr. Gray was under his jurisdiction?

A. Yes sir.

301 Q. As I understand it the round house is the place where all of these engines that come in from runs there rest?

A. Yes sir.

Q. And clean all the coal and cinders out and get wood and water and were put in there to stay until the next trip?

A. Yes sir.

Q. And in the round house is some repairs done, too?

A. Yes sir.

Q. The dispatcher takes the engine after the train crew leaves it near the round house?

A. Yes sir.

Q. The round house with the coal shed, sand house and the cinder pit and the blow off box and these other buildings are all crowded together?

A. They are.

Q. You know of no definition in the railroad service as to what constitutes employees or who shall be employed on the road?

A. No sir.

Q. No standard fixed so far as you can say as to where the division line is.

A. No sir.

Q. Mr. Armstrong I show you Exhibit "9" and ask you if that is a photograph taken at or near the north end of the cinder pit looking south in Antigo?

A. Yes, it is.

The plaintiff now moves to strike out all the testimony of this witness except his testimony identifying Exhibit "9" for the reason urged in our objection of the testimony when first offered, that is the testimony elicited from this witness since he was last called to the witness stand and bearing generally upon the question of so called inter-state traffic.

The motion is granted as far as the testimony goes to the phase of inter state traffic.

Whereupon the defendant duly excepted.

The plaintiff moves to strike out the balance of the testimony for the reason it is immaterial, incompetent and irrelevant and now move to strike it out. The motion is granted.

Whereupon the Defendant duly excepted.

Defendant offers in evidence Defendant's Exhibit "1", being smaller of the two blue prints.

Defendant offers in evidence Defendant's Exhibit "2" being a photograph taken from the south of the cinder pit looking north.

Defendant offers in evidence Defendant's Exhibit "3" being
302 photograph taken at a point north of the cinder pit to south of the blow off box looking north.

Defendant offers in evidence Defendant's Exhibit "4", being photograph showing roadway west of the coal shed.

Defendant offers in evidence Defendant's Exhibit "5", being report of injured signed by Mr. Gray.

Defendant offers in evidence Defendant's Exhibit "6" being a large blue print being merely an extension both length wise and side ways of Exhibit "1" and showing more of the premises.

Defendant also offers in evidence Defendant's Exhibit- "7" and "8" being sketch made by Mr. Long and offered in his testimony, photograph taken at or near the north end of the cinder pit looking south.

Exhibits received.

Mr. KANE recalled by the defendant.

Examined by Att'y SMART:

Q. I don't remember whether Mr. Martin asked you whether or not the bell was ringing when you were coming over this cinder pit track or not?

A. I don't remember whether he did.

Q. Was the bell ringing at that time?

A. It was.

Q. Your attention has been called to plaintiff's exhibit. I suppose you admit that that is your report made on January 26, some seven days after the accident.

— . — . — .

Q. On that report did you make a statement of the facts as they were at that time?

A. Yes sir.

Q. And in that report you stated that in your judgment the engine was going about eight miles an hour?

A. Yes sir.

Q. And in a part of the same report you stated that in your judgment the bell was ringing on the engine?

A. Yes sir.

Q. Where did you turn that engine bell on if you remember?

A. Going into the Antigo yards south end of the city.

Cross-examination by Att'y MARTIN:

Q. Where did you turn it off first after getting in?

A. I don't remember of turning it off at all.

303 Q. Do you remember whether you turned it off at all or not?

A. I know that I didn't.

Q. Some one other than you did turn it off or it might have been ringing still?

A. Yes sir.

Q. The bell is one that is under the control of the engineer?

A. Not always.

Q. When it is being rung automatically it is the duty of the engineer to take care of it?

A. It is on his side of the engine.

Q. He ordinarily takes care of it?

A. Ordinarily, yes.

Q. But I suppose if you would go away and leave it ringing the fireman would shut it off?

A. Yes, the often put it on when running along.

Q. This bell has an automatic arrangement for ringing the bell and it doesn't always work?

A. Not always.

Q. What are some of the things that happen to prevent its ringing?

A. The cranks or parts of the bell gets dry, the cylinder might be worn out, the part that operates the piston and moves the cranks might be worn out and let the air get below it.

Q. And also the cold weather might freeze up the apparatus?

A. It doesn't freeze it up.

Q. In what way does it effect it?

A. In starting the bell sometimes it is hard to get it started in cold weather but after it gets started it will ring; it will keep on moving.

Q. When you testify that the bell was ringing you don't mean to say that you have a distinct recollection of it now as you have a knowledge of the fact that I hold this book in my hand or a knowledge of the fact that you are here and were here yesterday, but you conclude from that it was from what was your custom and practice.

A. No sir.

Q. You mean you distinctly remember that you had the bell ringing?

A. I distinctly remember talking this over with Mr. Kruse.

Q. Will you answer my question?

A. I distinctly remember the bell was ringing, I do.

Q. How many strokes of the bell was there between the north end of the cinder pit and the shanty?

304 A. Well, if I was a mathematician I might figure that out. The bell strikes about once every two seconds.

Q. Does it strike louder sometimes than others?

A. Sometimes, yes, it is according to the swing of the bell.

Q. How is that controlled?

A. Controlled by an automatic ringer or bell rope.

Q. Were you not ringing this bell with the bell rope as you went over the cinder pit?

A. No sir.

Q. In what way can you control the stroke of the bell with an automatic ringer?

A. By controlling the volume of air for example by the adjustment of the rope. It can be adjusted so it can swing further over or so it won't swing so far.

Q. So it will ring faster or slower?

A. Yes.

Q. At the time you were coming in there with this engine was your mind fastened on the fact that the bell was ringing?

A. Yes sir.

Q. Always?

A. I never went in there that I didn't think of it.

Q. You would have to do that?

A. No sir, but that is my practice.

Q. Do you say so because that was your practice?

A. I know it; I positively know it.

Q. The bell never rings without you have knowledge of it; without you are conscious of the fact that the bell is ringing when you go through that place?

A. No sir.

Q. You have a distinct recollection of that ringing and the circumstances, although you run a 1000 engines over there?

A. Yes sir.

Q. Each has a distinct and separate recollection?

A. Not each one, but this particular one.

Q. I suppose you were careful to see that the bell was ringing on this occasion because of the great obscurity of the view?

A. Not exactly; I am careful on all occasions.

Q. Were you careful on that occasion because of the fact that there was a considerable amount of steam in there so dense that it obscured your view and over an area clear to the turn table and you couldn't see the rail?

305 A. I could see the rail except for a short distance before the cinder pit.

Q. Do you mean to say that within two feet in front of the train for some distance ahead you can see the rail?

A. You might not for two feet ahead. You can see the rail pretty close though. Q. Yes sir.

Q. What I want to know is if the rail on your side wasn't obscured by steam and smoke and vapor?

A. There was some steam and smoke and vapor over this cinder pit but not so much but what I could see the rail.

Q. I want to know from you now, without any equivocation, whether or not the rail on your side was obscured, and by obscured I mean that you couldn't see it for steam and smoke and vapor at that point?

A. I could see the rail on my side at all points.

Q. What do you understand by control of an engine?

A. Being able to stop within your vision.

Q. That is, being able to stop your engine within the distance that you can see ahead clearly?

A. Yes sir.

Q. If this fog and smoke and steam was so great that you couldn't see the space 20 feet ahead of your engine your view would be obscured would it not? Suppose it was a dense bank of fog and steam and vapor obscured your view so you couldn't see the track at all for 20 feet ahead of your engine, your view would be obscured?

A. Yes sir.

Q. And you wouldn't be authorized to move at all under those conditions?

A. I wouldn't consider it that way, no.

Q. You said stopping your engine within the distance you could see ahead. Now, if the entire distance of 20 feet ahead of your engine was obscured so you couldn't see anything, then you couldn't move ahead. Your duty then would be to send some one ahead, wouldn't it?

A. That depends on the obstruction.

Q. Suppose you ran into a fog—the nose of your engine runs into the fog so you couldn't see the pilot of your engine, that would be wholly obscured?

A. Yes, practically.

Q. Then in order to have your engine under control you would have to stop and send some one ahead, isn't that the practice?

A. That is not the practice.

306 Q. Well, then, you have either got to resort to that or stop your engine until the fog closes?

A. We would stand still or go show and easy. I have been in fogs as dense as that.

Q. Then you did run your engine at the rate of speed in which you couldn't stop within your view?

A. No, I didn't.

Q. If you are running your engine 18 miles an hour and running in a fog that is so dense you can't see the pilot of your engine can you stop your engine within your view and you cannot estimate

the distance ahead because the track is obscured, can you then stop your engine within your view?

A. Do you mean sitting where I am in cab and I can't see the pilot?

A. Suppose it was so dense you couldn't see your hand in front of you?

A. A man can't stop one foot or two feet; that is unreasonable.

Q. The fact is, that in all railroading and all rights among engineers, it is understood that you have your engine under control when you are able to stop your engine within the distance that you can clearly see ahead? That is the fundamental principal of railroading?

A. In some cases.

Q. Are you able to point out any of the "some cases" in exception.

A. For instance, I am following a train and we are in between two stations and I have occasion to get over side of them and by running on further can stop within my vision. I am running on time; it depends on whether or not we are on the main line and running between 40 and 50 miles an hour. If it is a dense fog I am not going to expect that we will be on time under such conditions of the weather; they don't expect it because they won't move two trains along between those points.

Q. I am not asking you anything about running between two points I am asking you whether you recognize as a fact with reference to having an engine under control if it isn't fully recognized that an engine is under control when you can stop your engine within the distance you can see ahead?

A. What is recognized by us as an engine under control
307 is not the same thing as another engine crossing a track.

Q. Now, you know you have reneged; where with reference to the engine under control, you testified here when you were first called to the stand one of your replies was that you had your engine under control when you could stop within the distance that you could see ahead?

A. Certainly; of course you don't mean stopping for cows and horses and everything and whether you can see around a curve.

Q. Is it in reference to a man crossing on a public crossing?

A. Yes, it is.

Q. Do you mean if you were running over a public crossing and couldn't see ahead you could stop your engine before coming up to that crossing.

A. Yes sir, in all these cases it has reference to box cars and engines.

Q. Can you point out any rule that limits it in that way?

A. Certainly, when it says "stop within your vision" that is exactly what it means.

Q. Suppose you couldn't see the highway or crossing at all and you came within ten feet of it would you run your engine over it ten miles an hour?

A. Certainly.

Q. Any place?

A. Any place; we run faster than ten miles an hour over some crossings.

Q. Suppose you couldn't see the highway crossing ahead until you came within ten feet of it, would you continue to run your engine ten miles an hour knowing there is a crossing to be crossed?

A. Do you mean how fast may I run my engine or how fast am I going when I get to the crossing.

Q. You know what a highway crossing is?

A. I certainly do.

Q. Now assuming it is a public crossing and you cannot see the crossing at all until you get within 10 feet, would you approach that crossing at the rate of ten miles an hour? Knowing the crossing is there are you supposed to go over it at ten miles an hour?

A. Yes.

Q. I assume that you are passing over a line of road and you know there is a highway across the road ahead and you cannot see it until you get within ten feet of it, will you approach
308 to that point where you can't see it at ten miles an hour?

A. I don't understand your question; I can't answer it when I don't know what you mean by it.

Q. I suppose you know enough about railroading to know when the bell is being rung?

A. I do certainly.

Q. You know what a highway crossing is?

A. Yes sir.

Q. You sometimes run over them when they are more obscure than others?

A. Yes, sometimes you can see a mile ahead; sometimes can't see far ahead.

Q. I assume that you can't see it at all and are within ten feet of it, do you now understand?

A. Yes sir.

Q. I assume that you are now approaching to that point where you cannot see?

A. Yes sir.

Q. Would you approach to that point at the rate of ten miles an hour?

A. Why would I approach there at ten miles an hour.

Q. The question is would you approach as high as ten miles an hour on account of its obscurity?

A. I would approach it just as fast as I could turn the wheel; I would blow the whistle and ring the bell. I would approach it probably 50 miles an hour.

Q. Although you couldn't see it at all until you got within ten feet of it?

A. Yes sir.

Q. Then you have no such thing as having an engine until control or stopping within your vision?

A. Under the circumstances I told you.

Q. You try to preserve the safety of box cars but not the safety of people on crossings?

A. We figure people know enough to get off crossings when there is a big sign up that says "Look out for the cars."

Q. Were you examined about the obscurity of that track before a commissioner?

A. Yes sir.

Q. Was this question put to you: "Q. When you got to the south end of the cinder pit what condition did you find the cinder pit in?" and did you answer "A. I don't understand your 309 meaning."

A. I did if it is down there.

Q. I will go and read the questions and answers. "Q. Was there any smoke or steam coming from the pit? A. Steam. Q. What color? A. White. Q. What kind of a day was it with reference to temperature? A. Cold day. It was an ordinary day in winter? Q. A little bit colder than usual that day? A. I don't remember as to that. Q. Any thing else rising from that cinder pit besides steam? A. May have been smoke. Q. You don't know whether smoke or steam? A. It — have been smoke. Q. You don't know whether smoke or steam? A. It was steam. Q. Might it be a mixture of smoke and steam? A. Yes sir. Q. How much was there of both? A. There was a cloud of steam rising there probably three, four, five feet above the track?"

Q. Did you give those answers?

A. That there was a cloud of steam rising 3 or 4 feet above the track? A. Might have.

"Did it obscure your vision of the track at any time?

A. Of the track at that point. I possibly couldn't see the rails but I could see an object or any one in there.

Q. Couldn't see the road bed?

A. No.

Q. Couldn't see the rails?

A. I could on my side, on the right side."

Q. Why do you now say you could see the rails at that point on that side of the track where a cloud of steam was hanging over these?

A. Because I wasn't looking out.

Q. And now you say you saw it at all points?

A. Yes sir.

Q. Passing over the pit?

A. Yes sir.

Q. How did you happen to give such an answer then?

A. Possibly I slipped on account of my thinker not working quick enough.

"Q. About five feet? A. Between that, I don't remember. Q. Did it extend across the track? A. The cinder pit. Q. Did it cover the track at that point? A. Yes sir."

Q. Did you give that testimony?

A. Yes sir.

Q. Is it true?

A. Yes sir.

Q. Isn't the rail a part of the track?

A. It is all right.

“Q. Would you want to say it didn’t extend five feet in height?

A. I don’t remember; the steam was rising probably from three to six feet. Q. How far north did that steam extend beyond the north end of the cinder pit? A. I couldn’t say.”

Q. Did you give that testimony?

A. Yes sir.

Q. Was it true?

A. Yes sir, I believe it was.

Q. If it was true then it is true now?

A. Possibly, yes.

310 Q. It couldn’t be true then and false now?

A. No sir.

Q. The fact is you don’t know how far north of the cinder pit the steam did extend?

A. That is not in inches and feet.

Q. Was this question put to you: “Q. Did it extend to the north end of the coal shed?” and did you answer “A. I couldn’t say how far?”

A. I may have answered that.

Q. Well, did you?

A. I don’t remember; I know it didn’t extend to the north end of the coal shed.

Q. I asked you did you answer that question that way?

A. I may have.

Q. “Why can’t you say” and did you say?

“A. Couldn’t see through the steam.” Did you answer that way?

A. Yes sir.

Q. It was true?

A. Yes sir.

Q. And you gave that as the reason why you couldn’t tell whether the steam extended to the north end of the coal shed at that time?

A. Yes sir.

Q. Wasn’t your thinker working?

A. I guess it was.

Q. And this question was put to you? The question is “Did it extend to the north end of the coal shed?”

A. Couldn’t say how far.

Q. Why can’t you say?

A. I couldn’t see over the steam.”

Didn’t you give that as a reason why you couldn’t tell how far the steam extended north?

A. Well, that don’t look reasonable to me.

Q. You are the fellow that made the remark?

A. I could see the north end of the coal shed clear up to the round house.

Q. I am not asking you what you could see. That is your testimony; you gave that as a reason because you couldn’t see there?

A. I was able to see through it. I wasn’t bothered by the steam. I could see through it I don’t know how far.

Q. Did you give this testimony: "Q. How far up the track could you see?

A. See the round house, box car or engine if any one was in there."

You gave that did you?

A. Yes sir.

"Q. See to the round house over the steam?

A. Yes sir."

— You gave that testimony, did you?

A. Yes sir.

Q. That means the steam was down closer to the track and road bed?

A. Yes sir.

— You gave that testimony?

A. Yes.

Q. Was this question put to you: "How long was this body of steam?

A. I couldn't say; I didn't notice how long it was."

— Did you give that answer.

— Yes sir.

311 Q. Was that a fact?

A. Yes sir.

Q. Was this question put to you?

"Q. Didn't notice how long it took you to go through?

A. I didn't pay any attention."

Did you give that answer and is it a fact?

A. Yes sir.

"Q. Couldn't you say whether or not it extended as far north as the north end of the coal shed?

A. I couldn't."

— Did you give that answer?

A. Yes sir.

Q. With reference to the things that might happen so as to prevent the noise from an automatic ringer did you give this answer before the commission:

"Q. What are some of them?

A. Pit may be warm; may be dirty; may get dry on account of oil; air connections might be broke and other connections may be broken."

A. I don't understand how I could give any such answer as that; don't see how I could give it; don't know what I would mean by pit.

Q. What do you suppose it was in the place of pit? Might have something been worn? What would be worn?

A. Might be piston.

Q. It is a fact that sometimes the bell will stick and start to strike again?

A. Yes sir.

Q. It will work slow and strike up again?

A. Yes sir.

Q. If it tips over and gets caught it will probably balance right on top and leave your piston in the center.

Q. Requires going over again because it sticks?

A. Yes.

Q. It sometimes will get stuck and hold for some time—these automatic bell ringers?

A. It doesn't stick exactly; it will stay caught sometimes until the jar of the engine get it in the center and then it will go again.

“Q. As a matter of fact it is an easy matter to put them out of order? A. Yes sir. Q. As a matter of fact they get out of order easy and often? A. Yes sir.”

Q. Did you give those answers to those questions and is it a fact?

A. Yes sir.

Q. We have heard several times during the taking of this testimony that this engine was drifting; not working steam, and we have spoken of engines as drifting; when an engine moves, not working steam, the movement is wholly its momentum.

Objected to as cross examination. Overruled. Whereupon defendant duly expected.

A. Yes sir.

312 Q. Is there anything to confuse your knowledge as to whether or not the bell was ringing when you went in there? Was there a noise, just for instance, as my brother Smart has been making with that squeaking chair?

A. There wasn't noise enough to confuse what the bell would make.

Q. Was there noise enough to obscure the sound of the bell?

A. No sir.

Q. Wasn't the engine making noise?

A. Making noise but not enough.

Q. I suppose the main noise an engine would make would depend on whether or not the engine was lubricated or whether it was a new and good engine or whether it was loosely jointed?

A. Some.

Q. If the joints and other parts are well fitted and properly lubricated it will move along more smoothly than an engine that is old and not well lubricated. What I want to get at is that one engine will make more noise than another?

A. Yes, certainly.

Q. And in winter when it is cold vapor in the atmosphere will condense a good deal quicker than in summer when it is warmer?

A. I am not posted on the elements.

Q. Have you ever noticed that in the exhaust from your engine and the vapor in the atmosphere that you can see will condense and form into water more quickly in cold than in warm weather?

A. I am not prepared to answer that; I couldn't say.

Q. Did you have a talk with Mr. Gray, the plaintiff, at the Hoffman house in the city of Antigo, a short time after he was able to get out and around, in which you stated to him “You don't need

to be afraid of me because I had no business going up there over north of the cinder pit”?

A. No sir, nothing of that kind; no conversation of that kind.

Q. Did you meet him at the Hoffman house in the city of Antigo after he was able to be out?

A. I talked to him on several——

Q. Will you please answer my questions?

A. I don't know whether it was at the Hoffman house or not.

Q. You have no recollection of a distinct conversation at the Hoffman house?

A. No sir.

313 Q. But you did have conversations with him several times after he was able to be out?

A. Yes.

Q. Did you at the Baker house between the Hoffman house and the depot say to him that you didn't remember whether the bell was ringing?

A. No sir, I did not.

Redirect by Att'y SMART:

Q. In this deposition from which Mr. Martin has read and from which I want to read I assume it is your testimony or part of it that he read from.

By Att'y MARTIN:

Q. In so far as I have read to you this morning from your deposition I understand that you admit that was your testimony before the commission?

A. Not the reply to one in regard to the bell because I know that would be out of the thing entirely.

Q. That would be this afternoon, I mean the things I read to you this morning before dinner?

A. I suppose it was correct.

Q. That was a part of the testimony given before the commission?

A. I believe so.

By Att'y SMART:

Q. I will read from the deposition.

“Q. How far up the track could you see?

A. See the round house, box car or engine if any were in there.

Q. See to the round house over the steam?

A. Yes sir.

Q. How far up the track continuously from the front of the engine could you see when you got to a point at the south end of the pit?

A. Could see the whole length up.

Q. See over?

A. Yes sir, the top.”

Q. Did you so testify?

A. Yes sir.

"Q. As a matter of fact did that cloud of smoke over lay the track there and fill up the space between the coal shed and the building on the west side?

A. It extended in height so I could see above it."

Q. Did you so testify?

A. Yes sir.

"Q. That means you could see the top of the engine and box car?

A. Yes.

Q. And you could see a person walking in there?

A. Yes sir.

Q. After you got up close to the steam?

A. Yes sir.

Q. You couldn't say such a person was walking if he was going on the side of the track close to the track?

314 A. I could see if he was on the right side. I could see him then."

— Did you give that testimony?

A. I could see him on the right side, yes.

Q. I believe you testified the other day that with a class "R" engine, sitting in your seat on the cab, a person over on the left rail would disappear from your vision at about 150 feet from the engine.

A. I should judge about that.

Q. These boilers in a class "R" engine are how high?

A. They are higher than you are on the seat box.

Q. What is it cuts off your view any considerable distance from you?

A. The length of the boiler extending out ahead.

Q. You can't see over the top of the boiler?

A. No sir.

Q. You spoke in cross examination by Mr. Martin about the manner in which the bell ringing could be changed. Could that be done, that change be made in the cab or would you have to get out on the pilot?

A. Have to get out on the pilot.

P. H. MARTIN, being first duly sworn, testified for and on behalf of the Defendant, as follows:

Direct examination by Att'y SMART:

Q. Mr. Martin you are attorney for the plaintiff in this case?

A. I am of counsel for the plaintiff in this case.

Q. You are the attorney who was just examining Mr. Kane?

A. I did examine him.

Q. Which rule is it you referred to in cross examination of Mr. Kane with reference to stopping within vision and I hand you book of rules.

A. I decline to answer your question, sir.

Q. I hand you book of rules of the Chicago & Northwestern Railway Company, effective January 1, 1910, No. 9847, and ask

you if this is the Book of Rules of the Northwestern Company that you have had in your possession and Mr. McMahon, 315 your associate had had during the process of trial of this trial?

A. I believe it is.

Q. Can you point out to me in that book your rule which you referred to in cross examination of Mr. Kane?

A. I decline to answer your question.

Q. What are the grounds?

A. That it is not legitimate evidence.

Q. I have been unable to find it and would like to have you point it out to me?

A. I decline to answer your question.

I ask that the witness be instructed to answer.

Q. I ask you if you will look and find it.

A. I decline to answer.

The court rules that the witness is not obliged to answer. The defendant except- to the ruling of the court.

Mr. KANE recalled by the defendant, testified as follows:

Examined by Att'y SMART:

Q. Mr. Kane, Mr. Martin was asking you about some general rule of the Company in regard to operating your engine or train so as to be able to stop within your length of vision. Do you know what rule he referred to? Do you know of any such rule?

A. Why, yes.

Q. Where is that rule? What does it apply to?

A. It applies to trains operating between stations out on the road, with reference to the use of block signals and block trains.

Q. Then it applies to trains operating on the road out between stations?

A. Yes sir.

Q. Do you know of any such rule that applies to switch — or trains that are off from the main lines; not the yard, only in on the main line in the way of first class trains.

A. No, sir, It applies to anywheres in regard to engines or cars being on the track.

Q. Where?

A. In the yards, main lines, any place. A man isn't expected to go slow with an engine and train if he can see.

316 Q. There is no written rule governing it?

A. No sir, nothing only the block rule that I have referred to.

Q. That has no reference to the movements you would make at the time in question?

A. None whatever.

Cross-examination by Att'y MARTIN:

Q. It simply is a construction of what is meant by having your engine under control?

A. No.

Q. I am not talking about a written rule; the question is about what is meant by having your engine under control. That is what I asked you—what you understood by having your engine under control; whether it didn't mean having it so you could stop it within the limit of your vision going ahead or backwards.

A. Having your engine under control going ahead, backing up or stopping?

— Now what times is it under control?

A. At all times.

Q. Under what conditions?

A. Under any and all conditions.

Q. Is it under control at all times and under all conditions when you run into a box car?

A. If you can't stop there, is something wrong with the machinery or the apparatus.

Q. There is something wrong then with your vision when you can't see?

A. Suppose you are going around a curve—you can't see ahead but your engine is under control.

Q. Don't you know it is commonly understood by railroad men that an engine is under control only when you can stop it within the line of your vision in the direction in which the engine is moving?

A. That is exactly what this rule applies to—in regard to block-ing trains.

Q. Then you have some such language as that?

A. In regard to following trains between stations.

Q. Was this question put to you before the commission: "Q. You testified this morning that your speed was such that you could stop within a distance of 40 feet?"

A. Yes sir.

317 Q. What does it mean to have an engine under control?

A. Under control means to stop within—— Q. That means the furthest ahead that you can see? A. Yes. Q. That means the distance ahead so far as you can see the tracks? A. Yes sir. Q. See what is ahead of you? A. Yes sir." Did you give that testimony?

A. Yes sir.

Q. Then you meant to tell us that having your engine under control meant to have it so you could stop within the distance you can see ahead?

A. I believe that is the rule we are working under.

Q. Is that right?

A. That is right according to our rule of following trains—follow-ing trains between stations.

Q. Can you point out to anything in the book of rules that limits it to trains between stations and not to engines within yards? Doesn't it apply to switch engines within yards?

A. No, not that.

Q. What is the test by which you determine whether or not a switch engine in the yard is under control?

A. They are under control at all times.

Q. What is the test or standard by which you determine whether or not a switch engine in the yard is under control?

Objected for the reason that there is no rule obligating them or relating to keeping engines under control.

Objection overruled. Exception.

Q. Do you get the full meaning of that question?

A. Yes sir.

We further object for the reason the witness does not operate a switch engine.

Overruled. Exception.

A. A switch engine in the yard, if you are in the yard you can't see where you are going and you can stop within your vision; you are expected to find cars and engine jumping out in front of you, and you are able to be moving as far as the rule is concerned, to stop within your vision.

Q. That is the rule with reference to switch engines moving in the yard then would be this: you are supposed to so move a train or engine that you can stop it within the distance of your vision if box cars or engine or engines or a man was on the track?

A. I wouldn't compare a box car with a man.

Q. I suppose you would run down a man but not his rig?

A. We would suppose a man would get off the track.

Q. With reference to moving in the yard the test is that you would be able to bring your engine to a stop the distance that you can see an object ahead of you?

A. A car or an engine ahead.

Q. Does the same rule apply to engines that have just pulled a train into the yard and that has just cut loose and has to be run into the round house? I am not speaking about engines moving around the yards.

A. I am speaking about these other engines. Switch engines have a right to the yard where we haven't.

Q. With reference to the control of such engines as you are moving all the time within yard limits the test is you may move it in such way so you can stop it within your vision along your track?

A. So far as cars and engines are concerned not to do any damage.

Q. I suppose if you saw a man there you take it for granted he will step off and avoid a collision so far as the engine is concerned;

but the test is you will be able to stop within the limits of your vision?

A. If I saw a man there and he wasn't getting off I would stop.

Q. So far as operating the engine is concerned, we conclude as a rule that you will say you have your engine under such control that you can stop within the line of your vision?

A. Yes sir.

Q. On page six of your Book of Rules in connection with your method of moving do you know this: "In case of doubt adopt the safe course; speed must always be sacrificed for safety."

A. Yes sir.

Q. Have you also in connection with that reference to movements Rule 110, on page 50 in great big bull type: "In all cases of doubt or uncertainty the safe course must be taken and no risks assumed?"

A. Yes sir.

319 Q. On page 166 with reference to the moving of engines: "In case of doubt, adopt the safe course: speed must always be sacrificed for safety."

A. Yes sir.

Q. And another on page 6: "Obedience to the rules is essential to the safety of passengers and employees and the protection of property."

A. Yes sir.

Q. Isn't there written across every engine: "Speed must be sacrificed for safety" or "Safety before speed" or something to that effect?

A. There is something to that effect way up on the front corner of the cab near the lever.

Q. Put up there where you can see it?

A. We can't see it. If you would look for it you might.

Q. It is there on every other page of the rules: "Safety before speed?"

A. Yes sir.

Q. These rules were in force at this time when the accident happened to Mr. Gray?

A. Yes sir.

Q. Been in force for some time before that?

A. Yes sir.

Defendant rests.

WILLIAM GRAY called by the plaintiff in rebuttal.

Examined by Att'y MARTIN:

Q. Mr. Gray did you have a talk with the witness Kane at the Hoffman House in the city of Antigo shortly after you were able to get out?

A. Yes sir.

Q. In that conversation did Mr. Kane say to you: "You have nothing to fear from me because I had no business going over there north of the cinder pit?"

A. Yes sir.

Q. Did you also have a conversation about five days later in that city between the Hoffman house and the depot, and in that conversation did Mr. Kane say to you: "I don't remember whether the bell was ringing or not?"

A. Yes sir.

320 Q. State, Mr. Gray, what is the fact, whether or not some engines in drifting and in working steam passing along the line will make more noise than others?

A. I know of engines——

Q. I simply ask, what is the fact, will some engines make more noise and some less noise in passing along the road?

A. Yes sir.

Q. State whether or not, as a matter of fact, during your employment for the Northwestern road as dispatcher, you have heard engines passing along and have known engines passing along that track drifting, making no noise that could be heard save the sound of the bell?

A. Yes sir.

Q. Do you know what the fact is as to whether or not an engine moving along the road there would make more noise or less noise in passing over the track there when the ground is covered with snow than it will when there is no snow on the ground?

A. In my experience an engine will make more noise when the ground isn't covered with snow.

Q. Does the snow act as a muffler to the sound?

A. Yes sir.

Cross-examination by Att'y SMART:

Q. When was this when you heard an engine go by there somewhere and all you could hear was the sound of the bell the ringing of the bell and could hear no other noise of the engine?

A. When I was at the pit.

Q. What were you doing? Shoveling cinders out of a car?

A. No sir.

Q. What doing?

A. Dispatching an engine.

Q. Were you inside of the engine?

A. No, on the ground.

Q. One side?

A. One side.

Q. Were you listening for this other engine waiting for it to go by?

A. No, not necessarily.

Q. Then you were not listening for it?

A. No sir.

Q. All you mean to say is that before you knew it to get up to where you were all you could hear was the bell?

321 A. It didn't get up to where I was.

Q. It came up by you?

A. It came up maybe 200 or 300 feet then.

Q. Then it stopped?

A. Not to my knowledge, no. I don't know.

Q. That is the last you knew of it?

A. Yes sir.

Q. When it came up to 200 or 300 feet you heard the bell but didn't hear anything else?

A. No.

Q. You wasn't listening?

A. No, I didn't pay any more attention to it.

Q. You said that an engine run quieter on the snow?

A. Yes sir.

Q. I suppose if the snow gets under the rails and on top of the wheels it deadens the sound?

A. That will help to deaden it.

Q. As I understand it if you take and put your rails and ties in a solid body of some kind it will make it that much more firm than if simply in ordinary earth in the summer time?

A. It seems as though it ought to.

Q. You have seen in the summer time when the ground isn't frozen and the whole wheels were passing over the joints the rails would adjust themselves to the wheels as they passed over and they would spring up and down?

A. I have seen it when there was water on the track and it was spongy.

Q. If these rails weren't level or the ground frozen they couldn't do that?

A. Hardly.

Q. So far as yielding of the rails are concerned you think there would be less in the winter time?

A. Yes sir.

Q. And in the winter time the snow would be packed on the track between the rails?

A. Under the rails and between the ties.

Q. As I understand it the noise is made by the wheels running on top of the rails, in that part of it that is where the noise is made.

A. Not all.

Q. And if the snow was under the track wouldn't it change that noise of the wheels running on the rails?

A. Yes, it would.

Q. Will you explain now?

A. With any covering on these ties my experience is this:
322 that I have observed in a number of cases that in winter time I would be standing probably four or five blocks away from the train and in summer time when there is no frost or anything like that and no covering over the ties that the sound would travel further—more of the sound would go further; and in winter time when the ground is frozen and covered with snow and the track covered I have noticed that trains and engines will not throw the sound so far.

Q. It is a matter of how far the sound will travel?

A. It is my idea.

Q. It might be a difference in the amount of sound or might be a difference in the air?

A. That is the way I have of explaining it.

Q. It is whether sounds *effect* sound as it travels through the air or whether sound will travel further in summer than in winter.

A. No, it is not; it is a difference in the ground being covered or not covered.

Q. You think that is what makes it?

A. I think so.

Q. The rail joints are further apart in the winter?

A. Yes, I know they expand.

Q. When it gets five or ten degrees below zero these rails will contract a half to three-quarters of an inch.

A. You might shove a knife blade between.

Q. You have never seen them further apart than that?

A. In winter time when put in new.

Q. What do they do in the summer time?

A. There is supposed to be room to expand.

Q. As I understand it an engine drifting in either summer or winter the rattle of the rods would be the same—if it wasn't under steam just simply drifting?

A. It would.

Q. And it would make no difference in the noise of the relief valves?

A. No sir.

Q. About all the difference you think it would make would be the noise of the wheels on the rails or the sound of the wheels?

A. Yes.

323 Q. How far do you think, if you were listening to the wheels and you stood where you could hear an engine going eight miles an hour, how far do you think you could hear that engine?

A. I haven't any idea.

Q. How far do you think you could hear it?

A. I might hear it a car length.

Q. No further?

A. If drifting.

Q. That would be about twice as far as from you to me. Do you think that is as far as you could hear it?

A. Yes sir.

Q. Are you positive of that?

A. Yes I am.

Plaintiff rests.

The defendant moves the court to direct a verdict in favor of the defendant on the ground that it appears as a matter of law that plaintiff has not proven facts sufficient to constitute a cause of action.

Motion denied.

Whereupon defendant duly excepted to the ruling of the court.

Testimony closed.

324 STATE OF WISCONSIN,
County of Outagamie:

In Municipal Court for Said County.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Charge to Jury.

Gentlemen of the Jury:

The plaintiff, on the 19th day of January, 1911, while in the employment of the defendant in the capacity of engine dispatcher in its yards at Antigo, Wisconsin, was injured by being struck by one of defendant's locomotive engines in charge of and driven by an engineer and fireman in defendant's employment.

The plaintiff has brought this action against the defendant to recover damages for such injuries, which, he claims, were received while in the discharge of his duties, and were caused wholly without fault or carelessness, negligence or want of ordinary care on his part contributing to said injuries.

The defendant, while admitting that the plaintiff was struck and injured by one of defendant's engines, denies that the plaintiff was in the discharge or performance of any duty at the time he was struck by its engine, and alleges that the injuries received by him were caused solely by his own negligence.

This being a proper case for a special verdict, and such verdict having been asked for from you, I have prepared a special verdict in the form of fourteen questions which you will be required to answer. In answering these questions you must confine yourselves strictly to the evidence presented to you here in court from
325 the witness stand, bearing in mind the following instructions which are given to you for your guidance.

The burden of proof is on the plaintiff to establish by a fair preponderance of the evidence each of the material allegations of his complaint, not admitted to be true by the defendant.

"To preponderate" means to outweigh, so a "fair preponderance" of the evidence means that the evidence submitted on a single issue fairly outweighs the evidence submitted in opposition thereto. For a party to have a fair preponderance of the evidence does not mean that he must produce before you the greater number of witnesses; but that the testimony of the witnesses he does produce carries greater weight with you, has more convincing force than that in opposition thereto. In other words, if the testimony on a material disputed question in the case, is, in your judgment evenly balanced you can not find for the party having the affirmative on that issue; because he who has the burden of proof must establish his contention by a fair preponderance of the evidence.

Ordinary care is such care as the mass or majority of mankind would exercise under the same or similar circumstances.

Negligence is the failure to do what a person of ordinary prudence would do under the same or similar circumstances, or doing what a person of ordinary prudence would not do under the same or similar circumstances. The care required is ordinary care; that is, such care as a person of ordinary prudence would exercise under the same or similar circumstances. The failure to exercise such care is negligence.

Proximate cause means efficient cause; that which acts first and produces the injury as a natural and probable result, under such circumstances that he who is responsible for such cause as a person of ordinary intelligence and prudence ought reasonably to
326 foresee that personal injury to another may probably follow from such person's conduct.

Negligence is the proximate cause of an injury only when the injury is the natural and probable result of it, and, in the light of attending circumstances, it ought to have been foreseen by a person of ordinary care. It is not necessary, in order to constitute proximate cause, that the precise injury should have been foreseen or apprehended as certain to occur. It is sufficient if an ordinarily careful and prudent person ought, under the circumstances, to have foreseen that an injury might probably result from the negligent act.

Contributory negligence is such negligence as proximately helped to produce the injuries complained of. If you should find from a fair preponderance of the evidence that the negligence of the plaintiff proximately helped to produce the injuries complained of you will answer the eleventh question "yes". If you should find from a fair preponderance of the evidence that the plaintiff was not guilty of any negligence that proximately helped to bring about or produce the injuries complained of you will answer the eleventh question "no".

You are instructed, that if the testimony of a witness appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, then you have no right to disregard the testimony of such witness from mere caprice or without cause. You are the sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts. It is your right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor or frankness or the lack thereof, which witnesses are more worthy of credit, and to give weight accordingly. You are to consider all testimony in the case bearing on the issues, and to reconcile any and all apparently conflicting statements of the witnesses, and, if you
327 believe, from the evidence, that any witness who has testified in this case has wilfully sworn falsely on this trial as to any matter or thing material to the issues in this case, you are at liberty to disregard his entire testimony, except as in so far as it has been corroborated by other credible evidence or by facts and circumstances proved on the trial.

"Abrogated", as used in question numbered "3" means abolished, repealed, done away with. The right to abrogate an order lies in the

person who issued it and in his superiors in authority. An order can not be abrogated by those for whose guidance it was issued. If you should find, from the evidence, that the order issued by R. F. Armstrong, assistant division superintendent of the defendant, provided in substance that engines delivered on coal shed track to be dispatched should stop south of the cinder pit and that such order was abrogated by him or his superiors in authority prior to the date on which plaintiff was injured, you will answer question numbered "3" "yes". On the other hand, if you find from the evidence that said order was not abrogated by said Armstrong or by his superiors in authority, you will answer said question numbered "3" "no".

Should you answer question numbered "3" in the affirmative, in considering question numbered 11, namely: "Was plaintiff guilty of any negligence which proximately contributed to his injury?" you can not impute negligence to him from the fact that said order has been abrogated, unless you find from the evidence that he knew of such abrogation, or would have known of it, had he exercised due diligence.

In considering question numbered "14", you will take into consideration the ability of the plaintiff to earn wages and perform labor prior to the time of his injury, as shown by the evidence; his ability to earn wages and perform labor since receiving the injury, 328 as shown by the evidence; the time lost because of said injury; the expenses for medical treatment and nursing; the disfigurement of his person; his physical and mental suffering, past and future, so far as discovered from the evidence to a reasonable certainty; and his permanent injury, if any; but in arriving at the amount, if any, you allow for permanent injury and future pain, you must be satisfied from the evidence that it is reasonably certain that the injury complained of will be permanent. You will also take into consideration the fact that such amount, if any, you allow for loss of future earnings, will be paid in a lump sum, and you will only allow for the present worth or value of the same. In other words you should allow to the plaintiff as damages, such sum as in the exercise of a sound discretion you may believe, from the facts and circumstances in evidence, will be a fair and just compensation to him for the injuries he has sustained.

In answering each question you must be satisfied from the evidence that the answer you agree upon is supported and established by a fair preponderance of the evidence on that particular question. You will notice that these questions are all to be answered by "yes" or "no" except question numbered "1", answered by the Court, and question numbered "14" which requires the answer to be in figures. When you have answered all questions except the one answered by the Court, your foreman will sign the verdict and bring the same into court. You will now retire to consider your verdict.

THOMAS H. RYAN,

Municipal Judge.

Defendant's requests for instructions to the jury were given as follows, except as same are severally marked "Refused", and due exceptions were taken severally to such refusals.

329 *Defendant's requests for instructions to the jury were given as follows, except as same are severally marked "Refused," and due exceptions were taken severally to such refusals.*

(Title of Action.)

Under question Number 2:

"This question requires you to find as to whether or not the defendant, prior to the day of the plaintiff's injury, caused an order to be issued providing in substance that engines delivered on the coal shed track to be dispatched should stop south of the cinder pit. This question presents for your determination a pure question of fact. The plaintiff and the witness Kane have testified that they saw such an order posted on the bulletin board, and that such order, according to their recollection, was signed or initialed Mr. Armstrong, the Assistant Superintendent. On the other hand, the defendant has produced Mr. Armstrong and he denies that he ever made or issued such an order. The defendant's foreman, Ashmore, to whose office it is claimed that such order would be directed or delivered, denies that any such order was ever issued or posted in his office, and this testimony is supported by the roundhouse foreman. The defendant has produced further testimony of various engineers and firemen whose duty it was to examine the bulletins, who have testified that they had no knowledge of such order and never saw or heard of the same. Other evidence has been produced by both parties tending to substantiate their respective contentions. In considering this question there is also a large amount of evidence that is practically undisputed that you are entitled to take into

330 consideration. It is testified to by various witnesses of the defendant that a custom or practice was nearly universally followed to leave the engines north of the cinder pit when the track was clear and not to do as it was claimed was directed by the alleged order; that this custom or practice was followed openly and with the knowledge and consent of the party issuing the order and other superior officers.

This testimony may be considered by you in determining as to whether any such order was ever issued in so far as it tends to corroborate or substantiate the direct testimony of the witnesses who have testified upon the point.

In considering the weight of the testimony as to this custom and practice you may consider the fact that a violation of orders by the employees would ordinarily be attended by discipline, suspension or discharge, and that under the undisputed proof in this case there is no record of any discipline, suspension or discharge of any employee for doing what it is claimed was prohibited by this order.

You are the sole judges of the facts on this question and should give full credit and weight to all the testimony, and should decide it fairly between the parties.

The plaintiff has the burden of proof to establish the affirmative of this question and to satisfy you to a reasonable certainty by a fair preponderance of the evidence that such an order was issued

as is described in this question, and if the proof does not so satisfy you you should so answer.

331 Under Question Number 3:

1st. "This question provides that if you answer question number 2 "yes," then you should decide whether such order was abrogated prior to the day of the plaintiff's injury.

2nd. Abrogated means repealed, set aside or annulled.

3rd. It is not necessary to be abrogated that such abrogation must be in writing nor that it must be in express terms. Abrogation may be brought about by conduct between the employe and the master in such a case as this.

4th. If you should be satisfied from the evidence in this case that such an order was issued and yet thereafter the various employes whose conduct it was intended to govern customarily and usually disregarded and failed to follow the terms of such order, and that such course of conduct was with the knowledge of the authority issuing the order, and without objection on the part of such authority, you are authorized to find that such order was abrogated and to be thereafter without effect, just as effectively as if a written order had been issued in terms repealing, annulling or setting aside the original order.

5th. In determining this question you should take into consideration all the facts and circumstances surrounding the case.

6th. You are permitted to take into consideration the fact, if you find such to be the fact, that the custom and practice of departing from the terms of the order in question was permitted without discipline or punishment by the superior officers of the employes, and that such course of conduct both on the part of the employes

and the superior officers followed for a long time prior to 332 the day of the plaintiff's injury.

7th. The burden of proof to establish the affirmative of this question is upon the defendant, and if you are satisfied to a reasonable certainty by a preponderance of proof that such order was abrogated, then you should answer this question "yes"; otherwise, "no."

Under Question Number 4:

1st. "This question provides that if you answer question number 2 "yes," and question numbered 3 "no", then was Engineer Kane guilty of negligence in running his engine north of the cinder pit in violation of such order at the time plaintiff was injured?

2nd. You should answer this question only in case you have answered the previous questions as I have indicated.

3rd. Negligence is failure to exercise that care which an ordinarily careful and prudent person would ordinarily exercise under the same or similar circumstances.

4th. In order to determine whether Engineer Kane was guilty of negligence in violating such order (assuming that when you have come to this question you have found that the order was issued and had not been abrogated) you may consider as to whether or not the order was issued to provide for the safety and protection of employes who would be liable to be working about the premises

in question, whether the order was issued for the purpose of keeping the engines from standing over the wrecker track switch so as not to allow ice to block the switch in the winter time.

333 5th. Some evidence has been produced in this case from which you may feel warranted in finding that such was the object and intention of the order.

6th. If you find such to be the case, then it would not necessarily follow that a mere violation of the order by simply going north of the cinder pit would constitute negligence.

7th. Duties between employees and others may be created by orders, rules and regulations. If, however, the orders or regulation in question was made or issued for the purpose of protecting property or for regulating the conduct of business as a matter of convenience and not for the safety of employees, it would not necessarily follow that a breach of the order, rule or regulation would constitute negligence; therefore, I instruct you that if you are satisfied from the proof in this case that any such order as is here claimed was issued, had for its purpose and intention solely the protection of the wrecker track switch, you would be permitted to find that a breach of the order did not constitute negligence unless you should be satisfied that the person breaking the order ought reasonably to anticipate that an injury might be done to some employee by reason thereof, even though the order was not promulgated for the protection of employees.

8th. The burden of proof to establish the affirmative of this question is upon the plaintiff, and if the plaintiff has not proven by a preponderance of the evidence, sufficient to satisfy you to a reasonable certainty that Engineer Kane was guilty of negligence in running his engine north of the cinder pit in violation of such order, then you should answer this question "no."

334

Under Question Numbered 6.

1st. This question requires you to determine as to whether or not the engine bell of the engine that struck plaintiff was ringing at and immediately prior to the time of plaintiff's injury. The plaintiff testified that as he was about to step up on the track he listened and did not hear any engine bell nor any noise of any approaching engine.

2nd. On the part of the defendant it is positively testified to by Engineer Kane and Fireman Kruse that the bell was ringing by means of the automatic bell ringer at the time in question. The defendant has also produced the testimony of Fireman Mulhern and cinder pit man Kraioski to the effect that the engine bell was ringing as the engine entered the yards.

3rd. You are permitted to take into consideration the fact that common prudence would ordinarily require the ringing of a bell of an engine during such movement about a yard; the customary practice usually followed by engineers in so moving their engines about the yard, the opportunities of the various persons who noticed and remembered the facts in relation to the ringing of the bell, the interest

or lack of interest of the parties who testified in relation thereto and all other facts and circumstances tending to corroborate the contention of the respective parties. You may take into consideration the fact that the bell on the engine was operated by an automatic bell ringer.

4th. You should try to reconcile the testimony if you can. If you should believe that the plaintiff is mistaken as to whether or not he stopped and listened for a bell, and that he may have been walking along through the smoke and steam with his thoughts bent upon some other matter, then you would be warranted in finding that his evidence did not meet or overcome the evidence of the employees on the engine who testified that the bell was ringing.

335 5th. You may take into consideration the interest of the plaintiff and also of the defendant's employees in testifying on this question the same as on any other question submitted to you. If you are satisfied that such interest is so great that it would induce any of them to give false testimony you may reject the testimony of such witness.

6th. Great interest of a party or of a witness invites great scrutiny on your part in determining the weight of the testimony.

7th. However, the question is one of fact and in determining you should carefully scrutinize all the testimony and answer the question as you believe the facts to be under the rules as to burden of proof, which I will give.

8th. The burden is upon the plaintiff to satisfy you to a reasonable certainty by a preponderance of the evidence that the bell was not ringing at and immediately prior to the plaintiff's injury, and if the plaintiff's proof does not so satisfy you, you should answer this question "no"; otherwise "yes".

336 Under Question Numbered 7.

"Under this question, if you answer question numbered 6, "no", then you should determine as to whether or not Engineer Kane was guilty of negligence in failing to cause the engine bell to be rung immediately prior to the time of plaintiff's injury.

I have heretofore defined negligence to you and you may apply that definition in answer to this question.

Under Question Numbered 9.

1st. "Under this question you are required to determine as to whether or not, under the circumstances existing, Engineer Kane was guilty of negligence in running the engine north of the cinder pit to a place where it struck plaintiff at the rate of speed at which he was running. You will be obliged to first determine the rate of speed at which the engine was running. As I recall the testimony, the proof shows that the engine was run from six to ten miles an hour.

2nd. The plaintiff claims that he could tell the rate of speed by reason of the violence of the collision when he struck him, and also the time which it took for the engine to pass him when he was knocked down.

3rd. In determining the weight of the plaintiff's testimony, you should consider the circumstances under which he was placed so far as the same affect his opportunity for observing and determining the rate of speed. He did not see the engine coming and not more than a few seconds elapsed while it was passing him, and during such time he was being knocked down and rolled over, according to his story.

337 4th. If you believe that the engineer and fireman on the engine had better opportunity for observing and determining the rate of speed, and by reason thereof their evidence is entitled to greater weight and controlling effect, you are at liberty to find a rate of speed as testified to by them or whichever one of them you believe would be testifying more exactly or accurately to the rate of speed.

5th. It is claimed by the plaintiff that the rate of speed was excessive and dangerous, and that by reason thereof engineer Kane was guilty of negligence. His negligence would depend entirely upon the circumstances. He had a right to assume and believe that employees working around the yard, would not voluntarily place themselves in positions of danger where they could not protect themselves by looking or listening and observing the approach of an engine.

6th. If you find that he was ringing the bell at the time the engine was approaching the point where it struck the plaintiff, then Engineer Kane was entitled to believe that by reason of such ringing of the bell, employees on the track within hearing thereof would be warned of the approach of the engine and would get out of the place of danger.

7th. You should take into consideration the situations as to what opportunities Engineer Kane had for viewing the track ahead of him and controlling his engine, and all the other facts and circumstances surrounding him at the time.

Under Question Numbered 10.

1st. "This question provides that if you answer question numbered 9, "yes", then you are to determine whether the negligent rate of speed at which Engineer Kane runs the engine was the proximate cause of the plaintiff's injury.

338 2nd. Simply because an engine is run faster than it ought to be under a given set of circumstances does not make the negligence of so running the same the proximate cause of the injury.

3rd. If you are satisfied that if the engine had been running at a lower speed which would have been consistent with ordinary care, and that while being so run, the plaintiff while in a position of danger, would have been struck in the same manner and with substantially the same injury resulting as he would from the higher rate of speed, then you can not determine that the negligent rate of speed was the proximate cause.

4th. If the plaintiff was enveloped in a cloud of smoke and steam so that he could not see the engine, and so that the engineer could not see him, then a difference in the rate of speed would give neither

party an opportunity to prevent the injury, and the excess of speed could not, by itself, alone, be said to be the proximate cause.

5th. If, however, the excess of speed over and above what would be consistent with ordinary care would produce or be responsible for the injuries in question, whereas a rate of speed consistent with ordinary care would not produce the injuries, then you would be warranted in finding that the negligence of Engineer Kane in running at an unreasonable rate of speed would be the proximate cause of the injury.

Under Question Numbered 11.

1st. "This question requires you to find as to whether or not the plaintiff was guilty of any negligence which proximately contributed to his injury. You will in considering the question, 339 apply the definition of negligence which I have heretofore given. If the plaintiff was guilty of any want of ordinary care, no matter how slight such want of ordinary care may be, then you should answer this question "yes," provided that you also find that such negligence contributed proximately to his injuries.

2nd. It is admitted by the plaintiff that at the time he left the cinder pit to go north and stood to the west thereof, he did not look to the south, from which direction he might expect and engine to come, and without so looking, he voluntarily went into a space between the west rail of the track and the studding of the coal shed, shown by the evidence to give a clearance between an engine of the class R-1 type, and the studding of from seventeen to eighteen or nineteen inches; that at the time he entered along this place he knew that the track was enveloped in smoke and steam and that his vision would be obscured.

3rd. He testified that he proceeded along this track so enveloped in smoke and steam for a distance of about sixty-nine feet from the southeast corner of the coal shed, to a point where he thought he would be opposite the shanty; that at this point he stopped and listened; that he knew that an engine was liable to come along by that point at any time; that he did not hear any engine bell ringing; that he could hear a noise similar to throwing water on the hot coals in the cinder pit; that the sound — of something like the 340 noise of the relief valves of an engine, but that in his judgment at that time it was not the noise from an engine; that after so listening, he raised his foot to step upon the track, and at that instant he was struck and injured.

4th. You have heard the testimony produced in this case tending to show the natural and necessary noises made by an engine in going over this track, all of which testimony, together with all other testimony bearing on this question, you will take into consideration.

5th. Plaintiff testified that he went into this place along the tracks through the smoke and steam, for the sole purpose of going to his shanty and waiting until such time as the appearance of another engine would require him to dispatch the same. He does

not claim that there was any imperative necessity for him to make this trip through this smoke and steam at this time.

6th. It is undisputed in the case that outside of engines to be dispatched and taken care of by the plaintiff other engines were liable at almost any time of the day to come from the south and go over the cinder pit, and along this track to or beyond the round house, and that plaintiff had knowledge thereof.

7th. Under these circumstances and under all of the facts and circumstances, and the entire situation surrounding the plaintiff, you will determine whether he exercised that degree of care and caution for his own safety and protection which the law requires.

8th. If he did not exercise that care which an ordinarily prudent and careful man ordinarily exercised under the same or similar circumstances, then you must find him guilty of negligence.

8½. He has no more right to voluntarily put himself in a position of danger that will result in great injuries or death, than has the defendant a right to carelessly or unnecessarily expose him to danger.

9th. In considering whether the plaintiff was guilty of negligence, you should consider the evidence calmly and dispassionately. You should not be carried away by any sympathy for the plaintiff nor prejudice against the defendant.

10th. The burden of proving negligence of the plaintiff is upon the defendant. However, if the facts showing negligence on the part of the plaintiff, appear to your satisfaction from his own testimony or from all of the testimony in the case, you may then so find him to be guilty of negligence.

If, under these rules, you find that he was guilty of negligence and that such negligence proximately contributed to his injury, you should answer this question "yes"; otherwise, "no."

Respectfully submitted,

EDWARD M. SMART,
Attorney for Defendant.

Dated July 20, 1912.

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Under Question Numbered Twelve.

"If in considering the evidence in relation to this question you are not satisfied to a reasonable certainty by a preponderance of the proof that the negligence of Engineer Kane was greater than the negligence of the plaintiff, assuming that you find both of them guilty of negligence, then you must answer this question "no."

If in your judgment the proof leaves it so that you are satisfied in your own mind that both Engineer Kane and the plaintiff were equally negligent, then you must answer this question "no."

Under Question Numbered Thirteen.

"If in considering the testimony under this question you are not satisfied to a reasonable certainty by a preponderance of the proof

that the greater negligence of Engineer Kane contributed in a greater degree to the plaintiff's injury than the plaintiff's negligence, assuming that you find both Engineer Kane and the plaintiff guilty of negligence, and that the negligence of Engineer Kane was the greater, then you must answer this question "no."

343 If you find that both Engineer Kane and the plaintiff were guilty of negligence, and also that the negligence of Engineer Kane was the greater, but you also find that the negligence of each contributed in equal degree to produce the injury, then you must answer this question "no."

Under Question Numbered 14.

"I instruct you that there is not sufficient evidence in this case upon which you would be warranted in finding that the accident to the plaintiff caused the pulmonary tuberculosis from which the plaintiff claims to be suffering at the present time."

Refused and exception allowed, T. H. Ryan.

Under Question Numbered 17.

"I instruct you that it appears as a matter of law from the undisputed evidence that the plaintiff was guilty of negligence which proximately contributed to his injury, and that you must answer this question 'yes.'"

Refused and exception allowed, T. H. Ryan.

Respectfully submitted,

EDWARD M. SMART,
Attorney for Defendant.

344 STATE OF WISCONSIN,
County of Outagamie, ss:

I, Margaret E. Hogan, Official Reporter for the Municipal Court for Outagamie County, Wisconsin, do hereby certify that the foregoing is a true and correct transcript of the evidence taken in the case of William H. Gray, Plaintiff, vs. Chicago & Northwestern Railway Company, Defendant; that I have carefully compared the same with my original notes taken upon the trial and that the same is a true and correct transcript thereof and of the whole thereof.

MARGARET E. HOGAN.

345 Whereupon, and at the same term, the defendant made and filed the following exceptions to the charge to the jury:

Defendant's Exceptions to Charge.

(Title of Action.)

And now comes the above named defendant, by Edward M. Smart, its attorney, and makes and files the following exceptions to the judge's charge to the jury:

1. The defendant excepts to that part of the charge reading as follows:

“‘Abrogated’, as used in question numbered 3 means abolished, repealed, done away with. The right to abrogate an order lies in the person who issued it and in his superiors in authority. An order can not be abrogated by those for whose guidance it was issued. If you should find, from the evidence, that the order issued by R. F. Armstrong, assistant division superintendent of the defendant, provided in substance that engines delivered on the coal shed track to be dispatched should stop south of the cinder pit and that such order was abrogated by him or his superiors in authority prior to the date on which plaintiff was injured, you will answer question numbered 3 ‘yes’. On the other hand, if you find from the evidence that said order was not abrogated by said Armstrong or by his superiors in authority, you will answer said question numbered 3 ‘No’.”

2. The defendant excepts to that part of the charge reading as follows:

“Should you answer question numbered 3 in the affirmative, in considering the question numbered 11, namely: ‘Was plaintiff guilty of any negligence which proximately contributed to his injury?’ you can not impute negligence to him from the fact that said order had been abrogated, unless you find from the evidence that he knew of such abrogation, or would have known of it, had he exercised due diligence.”

3. The defendant excepts to that part of the judge’s charge given on his own initiative and not on request, on the ground that the same is general, and is an improper way of submitting the issues to the jury, is confusing and misleading, and the parts above excepted to are contrary to the charge made on request.

EDWARD M. SMART,
Defendant’s Attorney.

Whereupon, the defendant requested the following questions to be included in the questions submitted to the jury:

Defendant’s Request for Questions in Special Verdict.

(Title of Action.)

And now comes the defendant, by Edward M. Smart, its attorney, and requests that the following questions be included in the questions submitted to the jury:

Question 1. Did the defendant, prior to the day of the plaintiff’s injury, cause an order to be issued providing in substance that engines delivered on coal shed track to be dispatched should stop south of the cinder pit?

Question 2. If you answer question numbered one “yes,” was such order abrogated prior to the day of plaintiff’s injury?

Question 3. If you answer question numbered one “yes,” and question numbered two “no,” then was Engineer Kane guilty of

negligence in running his engine north of cinder pit in violation of such order at the time plaintiff was injured?

Question 4. If you answer question numbered three "yes," then was such negligence of Engineer Kane a proximate cause of plaintiff's injury?

Question 5. Was the engine bell on engine No. 1066 ringing at and immediately prior to the time of plaintiff's injury?

Question 6. If you answer question numbered five "no," then was Engineer Kane guilty of negligence in failing to cause the engine bell to be rung immediately prior to the time of plaintiff's injury?

348 Question 7. If you answer question numbered six "yes," then was such negligence a proximate cause of the plaintiff's injury?

Question 8. Was the plaintiff guilty of any negligence which proximately contributed to his injury?

Question 9. If you answer either of questions numbered four or seven "yes," or both questions numbered four and seven "yes," and also question numbered eight "yes," then was the negligence of Engineer Kane greater than the negligence of the plaintiff?

Question 10. If you answer question numbered nine "yes," then did such greater negligence of Engineer Kane contribute in a greater degree to plaintiff's injury than the negligence of the plaintiff?

Question 11. Did the plaintiff know, under all the existing conditions and circumstances, that he might be injured by walking along the narrow space between the coal shed and the west rail of the track?

Question 12. Ought the plaintiff to have known in the exercise of ordinary care, under all the existing conditions and circumstances, that he might be injured by walking along in the narrow space between the coal shed and the west rail of the track?

Respectfully submitted,

EDWARD M. SMART,

Defendant's Attorney.

July 19, 1912.

Refused except as given. Thos. H. Ryan, Municipal Judge.

349 Whereupon, the jury retired and upon deliberation returned into court with their verdict, which is as follows:

Special Verdict.

(Title of Action)

1. Was the plaintiff, on the 19th day of January, 1911, struck by one of defendant's engines and injured?

Answer: Yes. (By the Court.)

2. Did the defendant, prior to the day of the plaintiff's injury cause an order to be issued providing in substance that engines de-

livered on coal shed track to be dispatched, should stop south of the cinder pit?

Answer: Yes.

3. If you answer question numbered two "yes," was such order abrogated prior to the day of the plaintiff's injury?

Answer: No.

4. If you answer question numbered 2 "yes" and question numbered three "no," then was Engineer Kane guilty of negligence in running his engine north of the cinder pit in violation of such order at the time plaintiff was injured?

Answer: Yes.

5. If you answer question numbered four "yes," then was such negligence of Engineer Kane a proximate cause of plaintiff's injury?

Answer: Yes.

6. Was the engine bell of the engine that struck plaintiff
350 ringing at and immediately prior to the time of plaintiff's injury?

Answer: No.

7. If you answer question numbered six "no," then was Engineer Kane guilty of negligence in failing to cause the engine bell to be rung immediately prior to the time of plaintiff's injury?

Answer: Yes.

8. If you answer question numbered seven "yes," then was such negligence a proximate cause of plaintiff's injury?

Answer: Yes.

9. Under the circumstances existing was Engineer Kane guilty of negligence in running the said engine north of said cinder pit to the place where it struck plaintiff at the rate of speed at which he was running?

Answer: Yes.

10. If you should answer question numbered nine "yes," then answer this: Was such negligence a proximate cause of plaintiff's injury?

Answer: Yes.

11. Was the plaintiff guilty of any negligence which proximately contributed to his injury?

Answer: No.

12. If you should answer the eleventh question "yes," then answer this: Was the said negligence of Kane greater than that of the plaintiff?

Answer: (No answer.)

13. If you should answer the twelfth question "yes," then did such negligence contribute in a greater degree to the plaintiff's injury than did that of the plaintiff?

Answer: (No answer.)

14. What sum will justly compensate the plaintiff for the injuries sustained by him?

Answer: \$7,815.00. Seven thousand eight hundred and fifteen dollars.

(Signed)

CHARLES FOSS, *Foreman.*

351 Whereupon the defendant, at the same term, made and filed the following alternative motions:

Defendant's Alternative Motions:

Now comes the defendant, by Edward M. Smart, its attorney, and upon the record in the above entitled action, and upon the minutes of the judge, makes the following alternative motions:

I.

For judgment for the defendant upon the undisputed evidence, notwithstanding the special verdict of the jury herein.

II.

For an order setting aside the special verdict and each and every part thereof, and for judgment upon the undisputed evidence.

III.

For an order changing the answer to the second question of the special verdict so that the answer will be "no," and for judgment for the defendant upon the verdict as corrected.

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352 For an order changing the answer to the third question of the special verdict from "no" to "yes," and for judgment for the defendant upon the verdict as corrected.

V.

For an order changing the answer to the fourth question of the special verdict from "yes" to "no," and for judgment for the defendant upon the verdict as corrected.

VI.

For an order changing the answer to the fifth question of the special verdict from "yes" to "no," and for judgment for the defendant upon the verdict as corrected.

VII.

For an order changing the answer to the sixth question of the special verdict from "no" to "yes," and for judgment for the defendant upon the verdict as corrected.

VIII.

For an order changing the answer to the seventh question of the special verdict from "yes" to "no," and for judgment for the defendant upon the verdict as corrected.

IX.

For an order changing the answer to the eighth question of the special verdict from "yes" to "no," and for judgment for the defendant upon the verdict as corrected.

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X.

For an order changing the answer to the ninth question of the special verdict from "yes" to "no," and for judgment for the defendant upon the verdict as corrected.

XI.

For an order changing the answer to the tenth question of the special verdict from "yes" to "no," and for judgment for the defendant upon the verdict as corrected.

XII.

For an order changing the answer to the eleventh question of the special verdict from "no" to "yes," and for judgment for the defendant upon the verdict as corrected.

XIII.

For an order changing the answer to the eleventh question of the special verdict from "no" to "yes," and answering question numbered 12 "yes" as a matter of law, and for judgment for the defendant upon the verdict as corrected.

XIV.

For an order changing the answer to the eleventh question of the special verdict from "no" to "yes," and answering question numbered 12 "yes" as a matter of law, and answering question numbered 13 "no" as a matter of law, and for judgment for defendant upon the verdict as corrected.

XV.

354 In the event of the denial of the motions aforesaid, or any one of them, sufficient to entitle it to judgment, the defendant moves for an order setting aside the special verdict and granting a new trial for the following reasons:

1. For errors of the court in the admission of testimony.
2. For errors of the court in the exclusion of testimony.
3. For errors of the court in refusing to exclude testimony.
4. For errors of the court in instructing the jury.
5. Because the verdict is contrary to law.
6. Because the verdict is contrary to the evidence.
7. Because the verdict is unsupported by the evidence.
8. Because the verdict is perverse.
9. Because the damages awarded are excessive.
10. Because the answer of the jury to the eleventh question is

unsupported by sufficient evidence, and is also contrary to the great weight of the evidence.

11. Because each and all severally of the various findings are contrary to and are unsupported by the evidence.

12. Because the final argument of Attorney Martin was so grossly improper and prejudicial that defendant was greatly prejudiced and injured thereby.

13. Because the court erred in refusing defendant's request to instruct the jury that there was not sufficient evidence in the case upon which they would be warranted in finding that the accident to the plaintiff caused the pulmonary tuberculosis from which the plaintiff claims to be suffering.

EDWARD M. SMART,
Attorney for Defendant.

355 Whereupon the plaintiff, at the same term, made a motion for judgment upon the special verdict.

Whereupon, and at the same term, the following order was made and filed:

Order for Judgment.

(Title of Action.)

The motions of the above named defendant for judgment for the defendant upon the undisputed evidence, notwithstanding the special verdict of the jury herein, and for an order setting aside the special verdict and each and every part thereof, and for judgment upon the undisputed evidence, and for an order changing the answers in the special verdict to the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh questions, and for judgment for the defendant upon the verdict as corrected, and for an order answering questions twelve and thirteen as a matter of law, and for judgment for the defendant upon the verdict as corrected, and in the event of denial of the motions aforesaid or any one of them, sufficient to entitle the defendant to judgment, for an order setting aside the special verdict and granting a new trial, having duly come on to be heard before the above named court, Thomas H. Ryan, Judge presiding, at the court house in the City of Appleton, Outagamie County, Wisconsin, and the plaintiff having appeared by S. J. McMahon and P. H. Martin, his attorneys, and the defendant having appeared by Edward M. Smart, its attorney, and said motions having been duly argued by counsel, and the court being well and sufficiently advised in the premises, now, upon all the records, files and proceedings herein, and on motion of S. J. McMahon and P. H. Martin, attorneys for the plaintiff,

It is Ordered, That the motions of the above named defendant in the above entitled action, be, and the same hereby are denied, and

It is Further Ordered, That judgment be entered in the above

entitled action, upon the said special verdict, in favor of the plaintiff and against the defendant and for costs.

Let judgment be entered accordingly.

Dated at Appleton, Wisconsin, this 29th day of November, 1912.

By the Court,

THOMAS H. RYAN,
Municipal Judge.

356 Whereupon, and at the same term, the defendant made and filed the following exception to the order for judgment, dated November 29, 1912:

Defendant's Exception to Order.

(Title of Action.)

And now comes the above named defendant, Chicago and North Western Railway Company, and excepts to that order of the court dated November 29th, 1912, wherein it is ordered that the motions of this defendant be and the same are denied, and that the plaintiff have judgment on the special verdict.

EDWARD M. SMART,
Attorney for Defendant.

Dated November 30, 1912.

357 Whereupon, and at the same term, and on the 4th day of December, 1912, judgment was entered in favor of the plaintiff and against the defendant for the sum of Seven thousand and eight hundred and fifteen dollars (\$7,815.00) damages, and One hundred seventeen and 51/100 dollars (\$117.51) costs, making in all the sum of Seven thousand nine hundred thirty-two and 51/100 dollars (\$7,932.51).

It has been stipulated between the parties to the action that all of the exhibits offered upon the trial of this action may be separately certified by the clerk of the Municipal Court for Outagamie County, Wisconsin, to the Supreme Court, under his seal with the some effect as though incorporated in the bill of exceptions.

And because the foregoing evidence, rulings, instructions and exceptions do not appear of record, I, the undersigned, the municipal judge who tried said action, have, on due notice settled and signed this bill of exceptions to the end that the same be made part of the record herein, this 19th day of March, 1913, and I certify that said bill of exceptions contains all the evidence given on the trial of said action by either party thereto, set forth by question and answer.

THOMAS H. RYAN,
Municipal Judge.

358 STATE OF WISCONSIN,
Municipal Court for Outagamie County:

WILLIAM H. GRAY, Plaintiff,

VS.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

It is hereby stipulated by and between the parties to the above entitled action that the foregoing bill of exceptions proposed by the defendant in said action shall constitute the bill of exceptions in said action, and that the judge of said court may sign and settle the foregoing bill of exceptions without notice to either party.

STEPHEN J. McMAHON,
Plaintiff's Attorney.

EDWARD M. SMART,
Defendant's Attorney.

Dated March 17, 1913.

359 In Municipal Court, Outagamie County, Wisconsin.

WILLIAM H. GRAY, Plaintiff,

VS.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

STATE OF WISCONSIN,
County of Outagamie, ss:

I, A. O. Danielson, Clerk of the Municipal Court in and for said County and State, do hereby certify that the papers hereto attached are the original Bill of Exceptions necessary to this appeal pursuant to Supreme Court rule one filed and of record in this office, in the above entitled action, and that the same are hereby transmitted to the Supreme Court of the State of Wisconsin pursuant to such appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court this 19th day of March, A. D. 1913.

[SEAL.]

A. O. DANIELSON, Clerk.

360 STATE OF WISCONSIN,
Municipal Court, Outagamie County:

WILLIAM H. GRAY, Plaintiff,

VS.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

It is hereby stipulated and agreed by and between the parties to the above entitled action that the appeal may be taken at once, and the bill of exceptions settled and signed hereafter and separately certified to the Supreme Court with the same effect as though certified with the rest of the record.

Dated December 4th, 1912.

STEPHEN J. McMAHON,
Attorney for Plaintiff.

EDWARD M. SMART,
Attorney for Defendant.

361 Indorsements: State of Wisconsin, Municipal Court Outagamie County. W. H. Gray, Plaintiff, vs. Chicago & Northwestern Railway Company, Defendant. Bill of Exceptions. State of Wisconsin, in Municipal Court for Outagamie County. Filed Mar. 19, 1913. A. O. Danielson, Clerk. Edward M. Smart, Attorney for C. & N. W. Ry. Co., Wells Bldg., Milwaukee, Wis. Filed Mar. 27, 1913. Clarence Kellogg, Clerk of Supreme Court.

362 State of Wisconsin, Municipal Court, Circuit Court Branch, Outagamie County.

WILLIAM H. GRAY, Plaintiff,

VS.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

It is hereby stipulated between the parties to the above entitled action, that the exhibits offered on the trial of said action, may be separately certified by the Clerk of the Municipal Court for Outagamie County, to the Supreme Court under his seal, with the same effect as though incorporated in the bill of exceptions:

These are:

1. Plaintiff's Exhibit A, Notice to produce papers.
2. Plaintiff's Exhibit B, Report of Wm. H. Kane, engineer.
3. Plaintiff's Exhibit C, Letter of Wm. Rock, dated Dec. 5, 1911.
4. Defendant's Exhibit 1, Blueprint showing location of tracks and buildings
5. Defendant's Exhibit 2, Photograph showing cinder pit.
6. Defendant's Exhibit 3, Photograph showing coal shed.
7. Defendant's Exhibit 4, Photograph showing path and roadway along west side of coal shed.
8. Defendant's Exhibit 5, Plaintiff's report of personal injury.
9. Defendant's Exhibit 6, Blueprint, which is an extension of Defendant's Exhibit 1, of tracks and grounds north of round-house.
- 363 10. Defendant's Exhibit 7, Sketch in pencil showing cross-section of in-going track to engine house, Antigo.
11. Defendant's Exhibit 8, Sketch in pencil showing south end of coal shed and vicinity, Antigo.
12. Defendant's Exhibit 9, Photograph taken near north end of cinder pit.

Dated March 10th 1913.

STEPHEN J. McMAHON,
Attorney for Plaintiff.
EDWARD M. SMART,
Attorney for Defendant.

364 STATE OF WISCONSIN,
Outagamie County

Municipal Court, Circuit Court Branch.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, a Corporation,
Defendant.*Notice to Defendant to Produce Papers, etc.*

Take notice that, as attorney for the above named defendant, you are hereby required to produce on the trial of the above entitled cause of action, the following described papers.

1. A letter bearing date on or about the 10th day of November, 1911, written and signed by R. E. Minahan, for Doctors J. R. Minahan and R. E. Minahan, employes of the defendant as physicians and surgeons, at Green Bay, Wisconsin, and addressed to William Hutchison, Master Mechanic, Ashland Division, C. & N. W. R. R., South Kaukauna, Wisconsin, and containing information relating to the injuries sustained by the above named plaintiff on the 19th day of January, 1911.

2. A written report bearing date on or about the 30th day of January, 1911, procured from the plaintiff by an employe of the defendant at the plaintiff's residence, purporting to be signed by the above named plaintiff and purporting to contain information relating to the manner in which the above named plaintiff was injured by being struck by one of the above named defendant's locomotive engines on January 19th, 1911, at Antigo, Wisconsin.

365 3. A written list of questions propounded to the above named plaintiff by one F. B. Piersol, an employe and claim agent of the above named defendant, at the residence of the plaintiff shortly before or after, on or about, the 30th day of January, 1911, while plaintiff was confined to his house as a result of the said injuries, sustained by *by* on the said 19th day of January, 1911, and the answers of the said plaintiff to said questions as taken down in shorthand writing and transcribed to longhand or typewriting by one James Gagen at the instance and request of said F. B. Piersol, and purporting to contain information relating to the injuries sustained by the plaintiff as a result of being struck by defendant's said locomotive engine on the said 19th day of January 1911, at Antigo, Wisconsin.

4. A written bulletin order, rule or regulation issued and promulgated by R. F. Armstrong, Assistant Superintendent of the Ashland Division of defendant's railway line, and posted or placed upon the bulletin board or rack in defendant's roundhouse in its railway yards, in the city of Antigo, Wisconsin, considerably previous to January 19th 1911, and prohibiting defendant's engineers from taking or placing ingoing engines farther north than a point south of said cinder pit on the ingoing track which runs immediately east

of and parallel to the coal shed in said yards, said bulletin having been testified to and identified by said plaintiff and one William Kane on adverse examinations, held before John A. Ogden, a Court Commissioner, at Antigo, Wisconsin, on June 15th, 1912.

5. A certain blue print map or diagram of the railway yards of said defendant at Antigo, Wisconsin, and indicating and showing the location of the tracks, buildings and other structures in said yards and used and exhibited in said adverse examinations of said plaintiff and William Kane, before said John A. Ogden, at Antigo, Wisconsin, on June 15, 1912.

6. All photographic views of pictures taken by the employe or employes of said defendant on or about June 15, 1912, showing the appearance of said yards and the tracks, buildings and structures therein or any part thereof.

7. Also all other documents, letters, books, papers, writings, rules, bulletins, maps, diagrams and photographs whatsoever, in your control or possession, or in the control or possession of said defendant or any of its servants, agents, employes or officers, containing any entry, memorandum or other matter in any wise relating to the matters in question in the above entitled cause of action.

And you are hereby notified that in case of your failure to produce the same, the plaintiff will introduce secondary evidence of their contents on the trial of the above entitled action.

STEPHEN J. McMAHON,
Attorney for Plaintiff.

Dated July 8th, 1912.

To Edward M. Smart, Defendant's Attorney, Milwaukee, Wis.

367 Indorsements: Municipal Court, Circuit Court Branch, Outagamie County. William H. Gray, Plaintiff, vs. Chicago & North Western Railway Company, a corporation, Defendant. Notice to Defendant to Produce Papers, etc. Original. Service of within by copy admitted July 10th, 1912. Edward M. Smart, Attorney for Defendant. Plnt'fs Exhibit "A."

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Form 148.

[In red ink:] Safety First.

Chicago & North Western Railway Company, Ashland Division.

Report of Personal Injury to Employes, Passengers, or Other Persons.

Instructions.—One of these reports must be made and sent to the Division Superintendent immediately after the infliction of an injury to any person whatsoever. In case the accident is caused by a train the names of the trainmen and number of train and engine must be given. A separate blank must filled out for each person injured whether the injury is severe or slight. Every question must

be answered fully. If blank spaces are insufficient for full statements, answer further in form of letter and attach hereto. If the injured person is an employe he should also make statement of facts in relation to the accident on this form.

1. Name, Residence, Street and Number, and Occupation of injured person, and state whether married or single. Wm. Grey, Antigo, Wis., Engine Despatcher—Married.

2. If passenger, where from and destination. —.

3. Ticket or pass. —.

4. If an employe, what is his age and how long engaged in the capacity in which he was acting when injured. —.

5. How long engaged in same capacity on other railroads. —.

6. Date and hour of accident. Jan. 19th, 1911—10.20 A. M.

7. Was it clear, foggy or stormy, daylight, dark or moonlight. Daytime—view obstructed by steam.

8. Place of accident; was it in a freight or roundhouse, on main track or in yard; if away from station, distance and direction. Don't know. Antigo, Wis.

9. Curve or straight line. Main or side track. —.

10. Was it on a highway crossing. If so, give name of same. —.

11. Were gates down. —.

12. Name of gatetender or flagman. —.

13. Number of train or engine and direction it was moving, and number and initials of car, and was it a through or local passenger, mixed or freight train that caused accident. Engine 1066.

14. Names of Trainmen, Switchmen and Enginemen. —, Yardmaster; —, Foreman; —, Conductor; —, Baggage-man; —, Switchman; —, Brake-man; Wm. Kane, Engineman; J. Kruse, Fireman.

15. State fully how the accident occurred and what the injured person was doing when it happened.

Where were you at time of accident and what were you doing. Don't know how accident happened, did not see injured person, and knew nothing about it for 30 minutes after Mr. Grey claimed engine 1066 struck him near cinder pit and coal shed track, I was running engine 1066 at the time he claims to have been injured.

[On margin in red ink:] Better cause a delay than cause an accident.

16. Speed of engine or cars at time of accident. About 8 miles per hour.

17. If train was late, how much. If backing up, who was on rear end. Going ahead.

18. If person was injured while coupling or uncoupling cars, what was make of apparatus, who examined same, and was it in good order, and what was height of draw bars from rail. Were there grab-irons on ends of cars. —.

19. If in bad order, were they so marked. —.

20. Was this accident in any way the result of Tools or Machinery being in bad order; if so, what was style of defective apparatus, or if by carelessness of any employe, how, and of whom and how

long had employe at fault been engaged in that capacity and how long on duty. Machinery was in good order. Don't know how accident happened. Engine bell was ringing.

21. Who was running engine and was it properly handled. I was running engine and it was properly handled.

22. Description of injuries. Don't know.

[On margin in red ink:] Better be careful than crippled.

23. Name and address of Surgeon called or to whom injured person was sent. Don't know.

369 24. What was done with and for injured person. Don't know.

25. What distance did engine or car run after accident. Don't know.

26. What does injured person say was cause of accident, and who, if anyone, does he blame for it. Don't know.

27. Name, occupation and address of every person who witnessed accident or can give any information regarding it:

Name.	Occupation.	Residence (give street and number).
No one witnessed it as far as I know.		
.....
.....
.....
.....
.....
.....

28. Give name, occupation and address of the persons who first got to the injured person after accident.

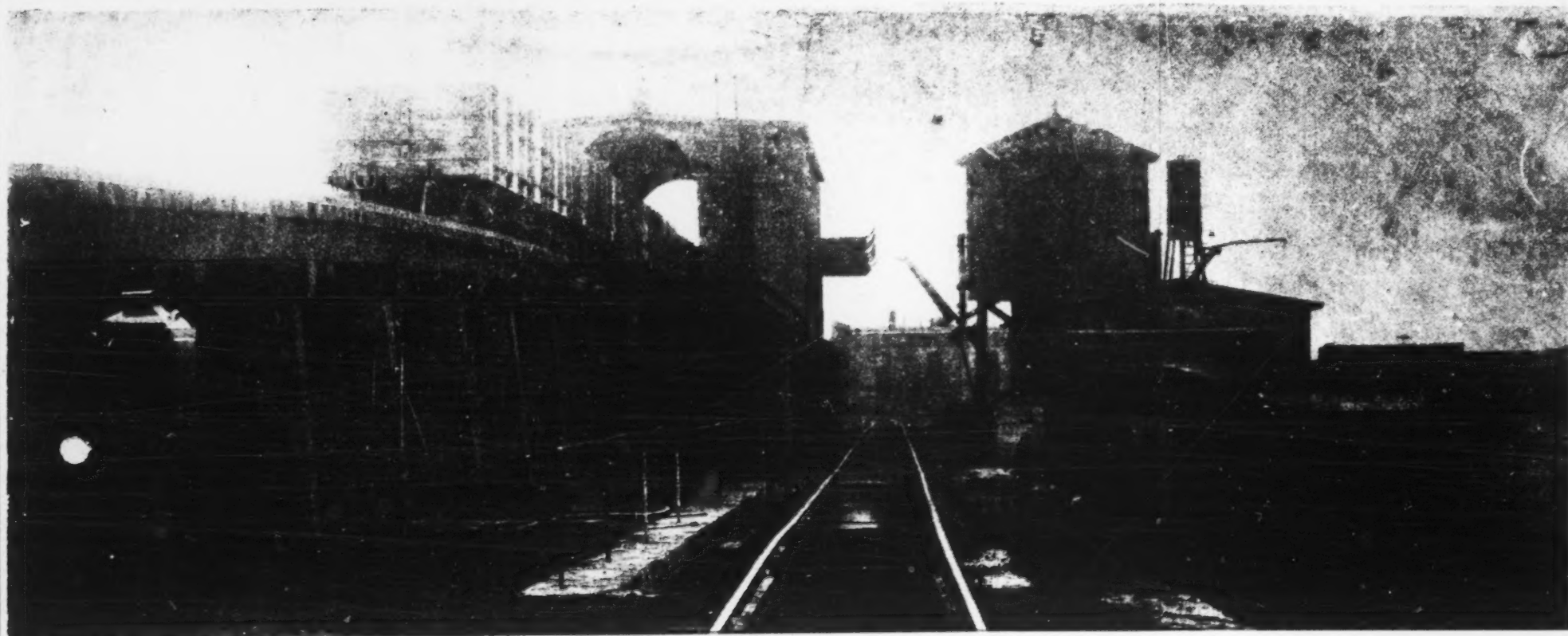
Name.	Occupation.	Residence (give street and number.)
Don't know.
.....
.....
.....
.....
.....
.....

29. State fully any further information you have in the matter.

[In red ink:] Remember that it takes less time to prevent an accident than it does to make a report.

(Sign Here) W. A. KANE,
(Occupation) Engineman.
(Address) Antigo.

Place. Month. Day.
Dated at Antigo, Jan. 26, 1911.







No. A.
 Chicago & North Western R'y Co.
 *Division.*
 Report of Personal Injury.
 Name
 Date
 Residence
 Please do not write on above blank.
 Plaintiff's Exhibit B.

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PLAINTIFF'S EX. C.

ANTIGO, Wis., Dec. 5, 1911.

On the 19th of January, 1911, when W. Gray got hurt I was sitting in the dispatcher's shanty. The shanty is about 8 feet *eight feet* from the track. W. Gray came in the shanty with his face covered with blood. I was surprised when he told me he was struck with an engine as I heard no engine go by or any bell ringing; if the bell was ringing I surely would have heard it. It was impossible to see an engine as there was so much steam coming from the pit it was a cold morning and the wind was blowing north.

WM. ROCK,
Eng. Dispatcher Helper.

371 STATE OF WISCONSIN:

In Supreme Court.

WILLIAM H. GRAY, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Stipulation as to Defendant's Exhibits 1 and 6.

Whereas, Defendant's Exhibit 1 in the record in this case is a blue print showing in part the contents of the blue print, Defendant's Exhibit 6, and is to such part a mere duplicate of said Exhibit 6, and all purposes will be served in this cause by sending up Defendant's Exhibit 6,

It is hereby stipulated that defendant's Exhibit 1 in the record may be omitted by the clerk from the transcript sent up to the United States Supreme Court, it being understood and stipulated that whenever in the record there is reference to Defendant's Exhibit 1, it shall be deemed a reference to Defendant's Exhibit 6.

Dated July 14, 1913. STEPHEN J. McMAHON,

Attorney for W. H. Gray.

EDWARD M. SMART,

Attorney for C. & N. W. Ry. Co.

372

(Endorsements:) Original. Supreme Court, State of Wisconsin. W. H. Gray, Plaintiff, vs. Chicago & Northwestern Railway Company, Defendant. Stipulation as to Defendant's Exhibits 1 & 6. Edward M. Smart, Milwaukee, Wis., Attorney for C. & N. W. Ry. Co. Filed Jul-19, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

(Here follow three photographs marked pp. 373, 374, 375.)

376

Form 148.

[In red ink:] Safety First.

Chicago & North Western Railway Company, Ashland Division.

Report of Personal Injuries to Employees, Passengers, or Other Persons.

Instructions.—One of these reports must be made and sent to the Division Superintendent immediately after the infliction of an injury to any person whatsoever. In case the accident is caused by a train the names of the trainmen and number of train and engine must be given. A separate blank must be filled out for each person injured whether the injury is severe or slight. Every question must be answered fully. If blank spaces are insufficient for full statements, answer further in form of letter and attach hereto. If the injured person is an employee he should also make a statement of facts in relation to the accident on this form.

1. Name, Residence, Street and Number, and Occupation of injured person, and state whether married or single. Wm. Grey, 514 Don Street, Antigo, Wis. Engine Despatcher. Married.

2. If passenger, where from and destination. —.

3. Ticket or pass. —.

4. If an employe, what is his age and how long engaged in the capacity in which he was acting when injured. 49 years old. 28 yrs. engaged.

5. How long engaged in same capacity on other railroads. None.

6. Date and hour of accident. About 11 A. M. Jan. 19th, 1911.

7. Was it clear, foggy or stormy, daylight, dark or moonlight. Daylight. Clear.

8. Place of accident; was it in a freight or roundhouse, on main track or in yard; if away from station, distance and direction. At cinder pit, Antigo roundhouse.

9. Curve or straight line. Main or side track. Straight track.

10. Was it on a highway crossing. If so, give name of same. No.

11. Were gates down. —.

12. Name of gatetender or flagman. —.

13. Number of train or engine and direction it was moving, and number and initials of car, and was it a through or local passenger, mixed or freight train that caused accident. Engine 1066, moving north.

14. Names of Trainmen, Switchmen and Enginemen. —, Yardmaster; —, Foreman; —, Conductor; —, Baggage-man; —, Switchman; —, Brake-man; Wm. Kane, Engineman; J. Kruse, Fireman.

15. State fully how the accident occurred and what the injured person was doing when it happened.

Where were you at time of accident and what were you doing. I had been at the cinder pit to see that the fire was put out of cinders

which were there and was going back to the shanty and as I was crossing the track the engine struck me. The steam which arose from the hot cinders blew down the track and as the engine approached over the pit I could not see it.

[On margin in red ink:] Better cause a delay than cause an accident.

16. Speed of engine or cars at time of accident. About 10 or 12 miles per hour.

17. If train was late, how much. If backing up, who was on rear end.

18. If person was injured while coupling or uncoupling cars, what was make of apparatus, who examined same, and was it in good order, and what was heights of draw bars from rail. Were there grab-irons on ends of cars. —.

19. If in bad order, were they so marked. —.

20. Was this accident in any way the result of Tools or Machinery being in bad order; if so, what was style of defective apparatus, or if by carelessness of any employe, how, and of whom and how long had employe at fault been engaged in that capacity and how long on duty. Not the result of tools or machinery being in bad order. Am unable to say who was to blame or responsible for accident.

21. Who was running engine and was it properly handled. Wm. Kane. Could not say as to how engine was handled.

22. Description of injuries. Skull fractured and cuts about head and on face. Three ribs broken and shoulder injured.

[On margin in red ink:] Better be careful than crippled.

23. Name and address of Surgeon called or to whom injured person was sent. Drs. M. J. Donahoe, and E. Omahue, Antigo, Wis.

377 24. What was done with and for injured person. Walked home and doctors were called to attend.

25. What distance did engine or car run after accident. About 300 feet.

26. What does injured person say was cause of accident, and who, if anyone, does he blame for it. Accident caused by view being obstructed by steam from pit. Am unable to place the blame.

27. Name, occupation and address of every person who witnessed accident or can give any information regarding it:

Name.	Occupation.	Residence (give street and number.)
.....
.....
No one saw	accident.
.....
.....
.....
.....

28. Give name, occupation and address of the persons who first got to the injured person after accident.

Name.	Occupation.	Residence (give street and number.)
Wm. Rock.	Eng. Despatcher	helper.
A. J. Baranezy.	Loco. Fireman.
.....
.....
.....
.....

29. State fully any further information you have in the matter.

[In red ink:] Remember that it takes less time to prevent an accident than it does to make a report.

(Sign Here) WM. GREY,
(Occupation) Eng. Despatcher,
(Address) 514 Don St., Antigo, Wis.

Place. Month. Day.
Antigo, Wis.

Dated at Jan. 30, 1911.

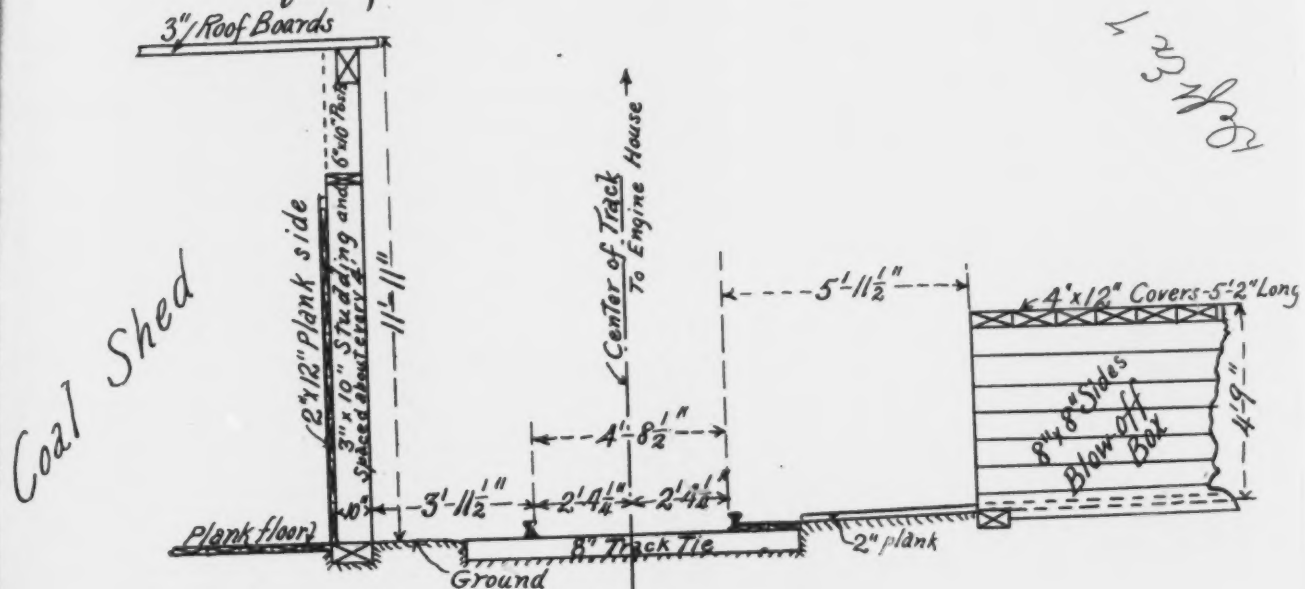
No. A.
Chicago & North Western R'y Co.
..... Division.
Report of Personal Injury.
Name.
Date.
Place.
Residence.

Please do not write on above blank.

Deft's Ex. 5.

(Here follows diagrams, &c., marked pp. 378 to 381.)

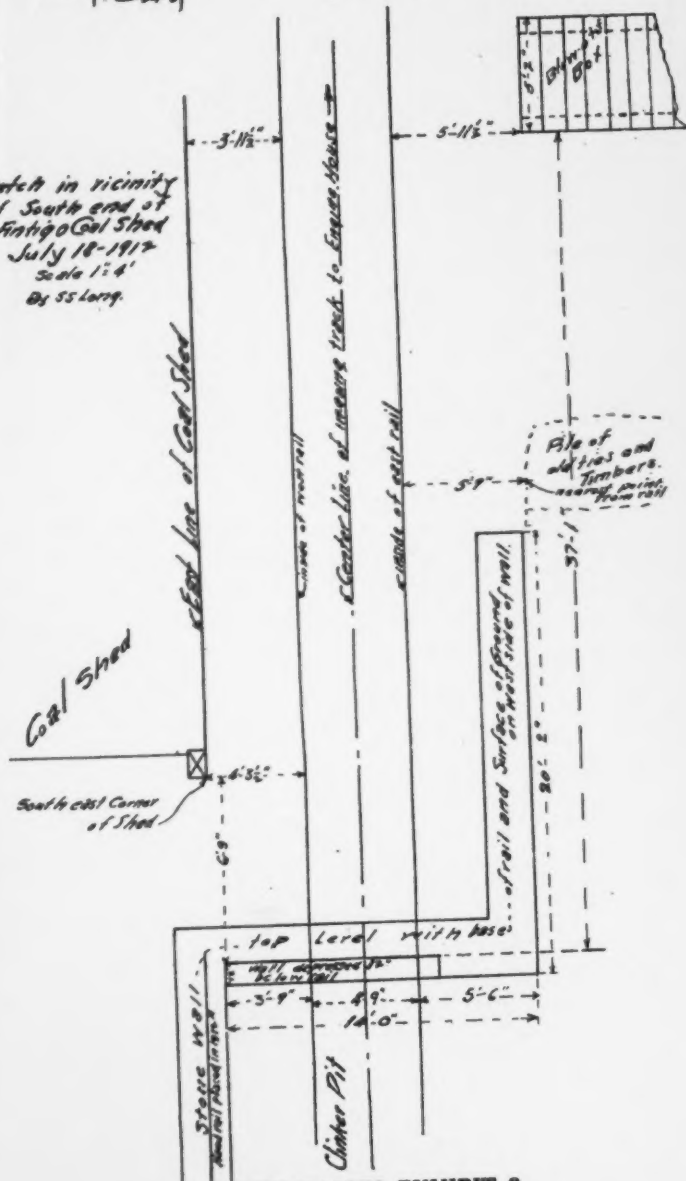
no. 232
 Conroy Co. } p. 379
 Gray



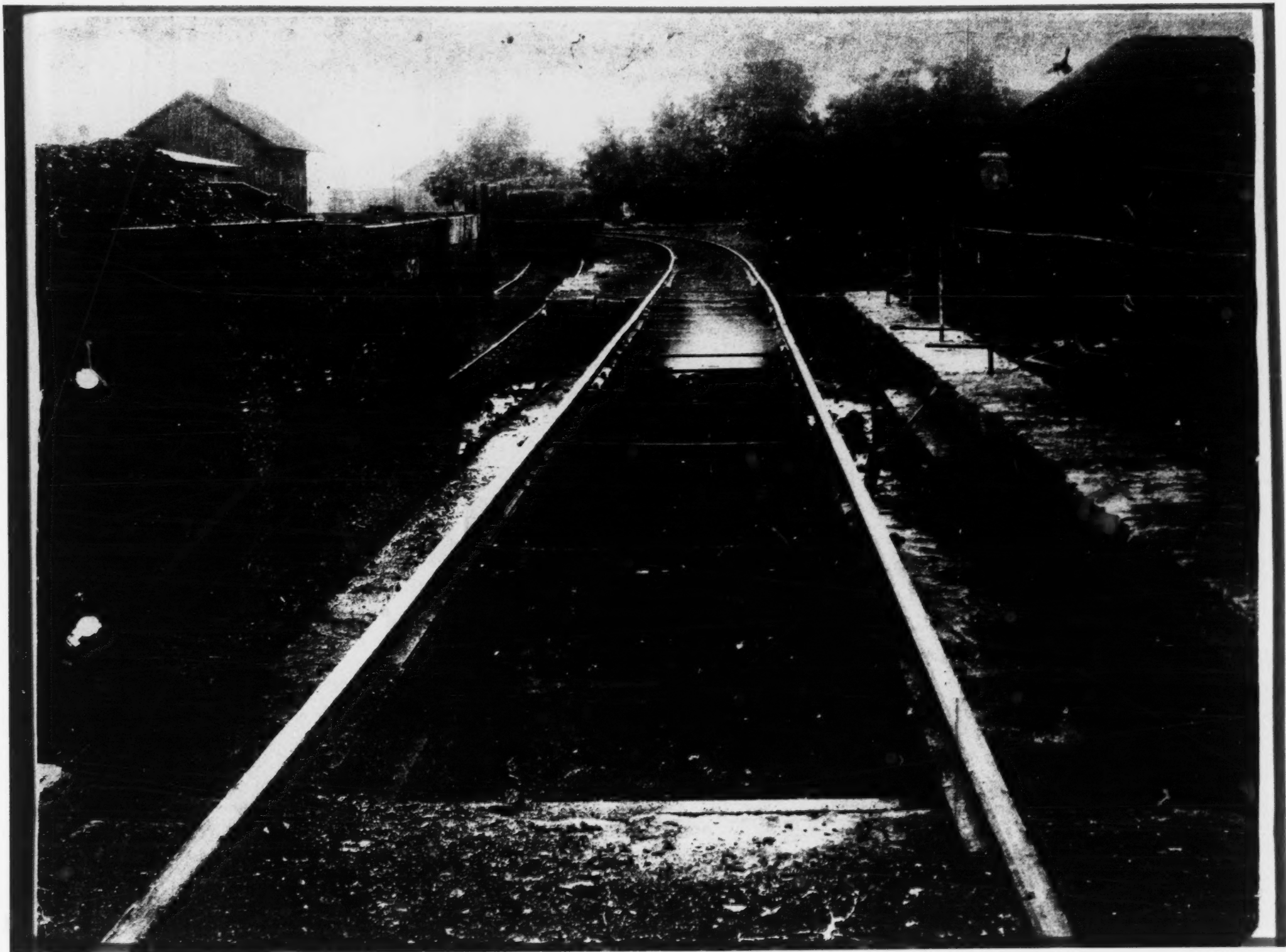
Cross-Section of in-going track to
 Antigo Engine House
 Taken on line with south side
 of Blow-off Box
 July-18-1912.
 Scale = 1" = 4'
 By S.S. Long.

C. & N. Ry. Co. } p. 380
 v.
 L. H. Ryan

Sketch in vicinity
 of South end of
 Fintigo Coal Shed
 July 18-1912
 Scale 1" = 4'
 By S. S. Loring.



DEFENDANT'S EXHIBIT 8



382 STATE OF WISCONSIN,
Outagamie County:

Municipal Court, Circuit Court Branch.

WILLIAM H. GRAY, Plaintiff,
 vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

I, A. O. Danielson, Clerk of Municipal Court for Outagamie County, in the State of Wisconsin, do hereby Certify that the foregoing and annexed paper writings, to wit:

1. Plaintiff's Exhibit A, Notice to produce papers.
2. Plaintiff's Exhibit B, Report of Wm. H. Kane, engineer.
3. Plaintiff's Exhibit C, Letter of Wm. Rock, dated Dec. 5, 1911.
4. Defendant's Exhibit 1, Blue print showing location of track and buildings.
5. Defendant's Exhibit 2, Photograph showing cinder pit.
6. Defendant's Exhibit 3, Photograph showing coal shed.
7. Defendant's Exhibit 4, Photograph showing path and roadway along west side of the coal shed.
8. Defendant's Exhibit 5, Plaintiff's report of personal injury.
9. Defendant's Exhibit 6, Blue print, which is an extension of defendant's exhibit 1, of tracks and grounds north of roundhouse.
10. Defendant's Exhibit 7, Sketch in pencil showing cross-section of ingoing track to engine house, Antigo.
11. Defendant's Exhibit 8, Sketch in pencil showing south end of coal shed and vicinity, Antigo.
12. Defendant's Exhibit 9, Photograph taken near north end of cinder pit.

introduced by the plaintiff and defendant, are all the exhibits offered on the trial of the above entitled action, and received in evidence; that the same are separately certified as a part of the Bill of Exceptions pursuant to a stipulation therefor, which stipulation is also annexed hereto, and the same are transmitted to the Supreme Court of the State of Wisconsin pursuant to the notice of appeal in said action.

383 In Witness Whereof, I have hereunto set my hand and affixed my official seal, this 12th day of March, 1913.

[SEAL.]

A. O. DANIELSON,
 Clerk of Municipal Court, Outagamie County, Wisconsin.

384 And afterwards on the 30th day of April, A. D. 1913, the same being the twenty-ninth day of said term, the following proceedings were had in said cause in this court:

Outagamie Municipal Court.

WILLIAM H. GRAY, Respondent,
vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by C. H. Gorman, Esq., for the said appellant, and by Messrs. S. J. McMahon and P. H. Martin for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein took time to consider of its opinion.

385 And afterwards, to-wit: on the 31st day of May, A. D. 1913, the same being the thirty-fifth day of said term, the judgment of this court was rendered in words and figures following, that is to say:

Outagamie Municipal Court.

WILLIAM H. GRAY, Respondent,
vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

Opinion by Chief Justice Winslow.

This cause came on to be heard on appeal from the judgment of the Municipal Court of Outagamie County and was argued by counsel. On consideration whereof; it is now here ordered and adjudged by this court, that the judgment of the Municipal Court of Outagamie County, in this cause, be, and the same is hereby affirmed with costs against the said appellant taxed at the sum of Eighty-seven and 50/100 Dollars (\$87.50).

386 Thereupon the opinion of the Court by Chief Justice Winslow was filed in words and figures following, that is to say:

387 In Supreme Court, State of Wisconsin.

January Term, 1913. No. 122.

WILLIAM H. GRAY, Respondent,
vs.

CHICAGO & NORTHWESTERN RY. Co., Appellant.

Personal injuries. Plaintiff, a man fifty-one years of age, was for years an employee of the defendant, and in January, 1911, was an "engine dispatcher" or "hostler" in the defendant's yards at Antigo, Wisconsin. His duties were to take charge of every engine coming into the yards at the close of its run, empty the fire box by dumping the coal and cinders into the cinder pit, run it to the coal house to be replenished with coal, to the water tank to be replenished with

water; thence to the wood bin to be supplied with kindling to start a fire, and thence to the roundhouse to wait for its next trip. He had an assistant named Rock, and a helper named Kraioski; the latter was called the pitman, and it was his duty to clean out the pan of the engine, wet down the coals and cinders, and shovel the cinders out of the pit. The tracks in the yards run practically north and south, the roundhouse being at the north end and the engines coming in at the south end. As the engine comes in to the yard it first reaches the cinder pit, a long rectangular pit, several feet deep, which is about eighty feet in length, somewhat wider than the track and immediately under the same; six feet nine inches north of this pit and on the west side of the track is a coal shed, which parallels the track for about two hundred and fifty feet northward, and is four feet three inches distant from the west rail thereof, leaving a clear-

388 ance space of about eighteen inches; on the east side of the track, about twelve feet distant from the east rail and about sixty feet north of the cinder pit is a small shelter shanty, nine

by fifteen feet in size, in which the plaintiff and his helpers stayed when not required by their duties to be actively at work; the sandhouse, water tank and wood bin were still further north on the east side of the track, and the roundhouse was two hundred feet further north than the woodbin. About thirty engines were dispatched during the twenty-four hours, of which the plaintiff and his assistant dispatched about half; their working hours were from six o'clock A. M. until six o'clock P. M. The accident in question happened between ten and eleven o'clock in the forenoon of January 19, 1911. The plaintiff testified that on that morning he and his helper had dispatched four engines prior to 8:20 o'clock, at which time he went to the depot to get his pay check; he then went to a grocery store and also to a saloon near by, and returned to the roundhouse after an absence of about fifty minutes; he remained at or in the vicinity of the roundhouse about three quarters of an hour and then walked southward on the east side of the track past the sandhouse and the shanty to a point about twenty-three feet south of the shanty, where he crossed to the west side of the track and walked along south along the east side of the coal shed, between it and the west rail of the track to the southeast corner of the coal shed, and continued south to a point three or four feet south of the north line of the cinder pit, where he stopped. He testifies that he came to this point because when he left the roundhouse he saw so much steam and smoke arising from the cinder pit that he concluded that he ought to ascertain whether the cinder pit man, Kraioski, was performing his duty in putting out the fire in the cinder pit; he further testifies that when

389 he reached the last point above stated he saw Craioski standing at the west edge of the cinder pit with the hose in his hands, throwing water on the hot cinders in the pit, and that when he saw this he started back to the shanty along a beaten path between the coal shed and the west rail; that smoke and steam were coming from the cinder pit in volumes and were blown northward so as to obscure the vision; that as he reached a point about opposite the shanty, as he thought, he turned eastward, stopped and listened a

few seconds, but heard nothing, as he thought, except the sizzling of the water on the cinders and hot coals in the cinder pit, and then started to step over the west rail of the track, and was struck by engine No 1066 and badly injured; he claimed that the engine was drifting or approaching noiselessly without working steam and without ringing the bell. The fact that he was struck by the engine is admitted. The negligence claimed was (1) the failure to stop the engine south of the cinder pit, in violation of a regulation or order claimed to exist to that effect. (2) the failure to ring the engine bell, and (3) the running of the engine at a negligent rate of speed under the circumstances.

The jury returned the following special verdict:

1. Was the plaintiff, on the 19th day of January, 1911, struck by one of defendant's engines and injured? Answer: Yes. (By the Court.) 2. Did the defendant, prior to the day of the plaintiff's injury cause an order to be issued providing in substance that engines delivered on coal shed track to be dispatched, should stop south of the cinder pit? Answer: Yes. 3. If you answer question number two 'yes,' was such order abrogated prior to the day of the plaintiff's injury? Answer: No. 4. If you answer question number two 'yes' and question numbered three 'no' then was Engineer Kane guilty of negligence in running his engine north of the cinder pit in violation of such order at the time plaintiff was injured? Answer: Yes. 5. If you answer question numbered four 'yes' then was such negligence of Engineer Kane a proximate cause of plaintiff's injury? Answer: Yes. 6. Was the engine bell of the engine that struck plaintiff ringing at and immediately prior to the time of plaintiff's injury? Answer: No. 7. If you answer question numbered six 'no' then was
390 Engineer Kane guilty of negligence in failing to cause the engine bell to be rung immediately prior to the time of plaintiff's injury? Answer: Yes. 8. If you answer question numbered seven 'yes' then was such negligence a proximate cause of plaintiff's injury? Answer: Yes. 9. Under the circumstances existing, was Engineer Kane guilty of negligence in running the said engine north of said cinder pit to the place where it struck plaintiff at the rate of speed at which he was running? Answer: Yes. 10. If you should answer question numbered nine 'yes' then answer this: Was such negligence a proximate cause of plaintiff's injury? Answer: Yes. 11. Was the plaintiff guilty of any negligence which proximately contributed to his injury? Answer: No. 12. If you should answer the eleventh question 'yes' then answer this: Was the said negligence of Kane greater than that of the plaintiff? Answer: (No answer.) 13. If you should answer the twelfth question 'yes' then did such negligence contribute in a greater degree to the plaintiff's injury than did that of the plaintiff? Answer: (No answer.) 14. What sum will justly compensate the plaintiff for the injuries sustained by him? Answer: \$7,815.00. Seven thousand eight hundred and fifteen dollars."

The usual motions were made by the defendant, for judgment notwithstanding the verdict, for correction of the verdict and judgment thereon as corrected, and, in event of denial of these motions,

for a new trial. All of the motions being overruled, judgment was rendered for the plaintiff on the verdict, and the defendant appeals.

391 WINSLOW, C. J.:

The appellant makes five contentions, viz: (1) that the plaintiff was guilty of contributory negligence as matter of law; (2) that the engineer of the engine was not acting within the scope of his employment when the accident happened; (3) that the court erred in refusing to receive evidence tending to show that plaintiff was employed in interstate commerce at the time of his injury; (4) that the court erred in admitting in evidence proof as to pulmonary tuberculosis, and in failing to instruct the jury that there was no evidence that the accident caused his tuberculosis condition, and (5) that the damages are excessive. These contentions will be discussed in their order.

I. The first contention is based principally upon the plaintiff's own admissions to the effect that he did not look to the south to see whether an engine was coming before he started to walk northward, that he knew it was dangerous to walk northward from the pit, either on the track or close to the track, because it was a common occurrence for an engine to move along over this space without giving the proper signals, and that notwithstanding this fact and the fact that he could not see to the southward, he started to cross the track. In addition to these admissions, the defendant insists that the plaintiff's claim that he listened and could not hear the signal and necessary noises of the engine as it approached is incredible.

These considerations were certainly amply sufficient to justify the jury in holding the plaintiff guilty of contributory negligence, but the question whether they would justify the court in so holding is a very different one. The plaintiff's testimony went further, however: he testified (and in this he is fully corroborated by other testimony)

392 that a yard regulation existed requiring incoming engineers to stop their engines and leave them for the "engine dispatchers" to take charge of before reaching the cinder pit, that as he walked northward he walked west of the track in a beaten path and not on the track itself; that he stopped before attempting to cross the track, and while he was still in a place of safety (namely, the clearance space between the track and the coal shed), and listened for somewhere from two to four or five seconds; that he heard no engine nor engine bell; that the only sound he could hear was a hissing noise which he thought was the noise produced by the throwing of water on the hot cinders in the pit, that he concluded that everything was clear, and then started to step across the track.

We are unable to say that this testimony is incredible; we suppose it is matter of common knowledge that a "drifting" engine frequently makes little noise; it may well be that under circumstances such as were testified to here the noise of the relief valve of such an engine might be so merged into the hissing of the water being thrown upon the cinders as to be indistinguishable. Taking into consideration the fact that there was a yard regulation requiring the stopping of all engines south of the pit and the further fact that yard men must

necessarily be frequently upon and about the tracks in the performance of their duties, we are unable to say that the plaintiff's conduct here was negligent as matter of law.

II. The engineer of the locomotive testified that he knew of the bulletin requiring engines to stop south of the pit to be delivered to the "engine dispatcher," but that he took his engine north to save himself walking; that he had to go to the roundhouse to leave his clothes, and that he always took his engine north as far as the water tank if there were no engines there, and the "engine dispatcher" received it at that place. From these facts it is argued that the engineer was not only disobeying orders, but was not within the scope of his employment, hence that his master is not responsible for his negligent act. The contention is clearly untenable. The engineer's duty was to deliver his engine to the "engine dispatcher"; he was directed to do that at a certain place, but he chose to do it at another place; in so doing he violated orders but was still within the scope of his employment. This subject has been gone over so recently that it is unnecessary to enlarge on it again. The principle is that if a servant is endeavoring to forward his master's business, but is guilty of negligence or even violation of orders in his endeavor, he will violate his duty to his master, but he will still be within the scope of his employment so far as third persons are concerned. Were it otherwise there would apparently be no redress against the master for injuries received by third persons at the hands of negligent or disobedient servants. *Ratliffe vs. C., M. & St. P. Ry. Co.* (present term).

III. The complaint does not allege that the defendant was engaged in interstate commerce or that the engine in question had been handling an interstate train, but simply that the defendant was operating trains and was carrying passengers and freight for hire between Antigo and other cities and villages in Wisconsin; neither did the plaintiff's evidence show that the defendant was transacting an interstate business. When the defendant took the case, however, it offered to show that it and its trains, engines and employees were engaged in hauling cars of freight continuously over this line between points in Illinois, Michigan, and Wisconsin at and prior to the time of the accident; that the engines which were being dispatched at this roundhouse at the time in question were making trips through Michigan to Ashland, making connections with the Watersmeet branch; that the engines running south wouldn't run outside the state; that those going and coming from the south handled refrigerator cars from Chicago. No offer was made to show that the engine in question had been hauling an interstate train or interstate freight, nor that all the engines dispatched at this roundhouse hauled interstate freight or interstate trains. Part of this testimony was received against objection, but ultimately it was all stricken out, and so the question whether the federal employers' liability act controlled the present case was eliminated from the case.

An attempt is made by the respondent to justify this ruling on the ground that the testimony was incompetent and immaterial,

because there is no claim made in the answer that the plaintiff was employed in interstate commerce at the time of his injury. We should be slow to hold to so strict and technical a rule. The statutes of the United States are the law of the land, and not like the statutes of our sister states which must be pleaded and proven in order to be available. Furthermore, the fact that the great railroad systems of the state are continuously engaged in both kinds of commerce must, we think, be so well known as to be matter of common knowledge. We do not find it necessary to decide this question, however, as we are of opinion that the ruling was right on the merits. As it was pointed out in the recent case of *Ruck v. C. M. & St. P. Ry. Co.* (present term,

140 N. W. Rep., 1074), it is necessary in order to bring a case within the federal act not only that the employer be engaged in interstate commerce, but that the injured employee shall suffer his injury "while he is employed" in interstate commerce. Taking care of an engine after it has completed its run and preparing it for the roundhouse seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply repairing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce. *Ruck v. C. M. & St. P. Ry. Co.* (supra).

We think there is a stronger ground, however, upon which the ruling of the trial court may be sustained. It appears that the plaintiff at the time of the accident here was walking back to his rest shanty, and was doing nothing at all in the way of dispatching engines. Now it may perhaps be correctly held (though we do not decide the question) that a man whose day is spent in dispatching engines all of which are engaged in interstate commerce is in legal effect employed in interstate commerce during the whole day and including the periods of leisure or rest when he is doing nothing but waiting for the arrival of an engine; but if, on the other hand, part of the engines dispatched be engaged in interstate business and part in local or intrastate business, we are unable to see how it could be logically said that he was "employed in interstate commerce" all day or during his intervals of leisure. In the present case, as we have seen, there was no offer to show that all the engines dispatched daily by the plaintiff were engaged in interstate commerce. As said

before in this opinion, we think it must be considered a matter of common knowledge that the great railroad systems of the present day are engaged in both interstate and intrastate commerce all the time and side by side. The offer of proof in this case went little, if any, further than this. It was noticeably guarded and indefinite in its purport; every word of it might be admitted to be true and yet it would not be shown that all the engines dispatched at this roundhouse by the plaintiff were engaged in interstate business, nor even that the engine in question had been so engaged. The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish the fact that the plaintiff's entire work consisted of the dispatching of engines engaged in interstate commerce. Error must appear af-

firmatively,—it is not to be presumed. We conclude, therefore, that there was no error in these rulings.

IV. It appears from the evidence that the plaintiff received severe bruises, wounds and contusions on the head, body and hips at the time of the accident, that several ribs were broken and that he was in bed two weeks; that his left arm is still partially paralyzed, that he suffers pain in the left arm and shoulder practically all the time, that he is incapacitated for physical labor, is afflicted with occasional spells of dizziness, and that his average weight is reduced from about 160 pounds to about 130 pounds. The injury was suffered in January, 1911; he was examined by Doctor Connell of Fond du Lac in May, 1912, and it was then found for the first time by examination of his sputum that he had incipient consumption or tuberculosis of the lungs. He testified himself that he had had night sweats and hemorrhages. This testimony was received against objection, and the court refused to instruct the jury, as requested by the defendant, that

they could not find that the accident caused the pulmonary
397 tuberculosis from which the plaintiff is suffering. The defendant's contention is that there is no sufficient evidence to establish any causal relation between the physical injury and the tuberculosis which existed more than a year later, and that the relationship between the two is purely conjectural. There was medical testimony to the effect that an injury such as plaintiff received is likely to induce or incite tuberculosis by reducing the natural resistance of the patient, lowering his vitality and putting him in a condition whereby he is unable to withstand infection. If this testimony were the only testimony tending to show a causal relation between the injury and the tuberculosis, we should agree with the defendant's contention. If decreased powers of resistance resulting from an injury are to be considered as a link in the chain of causation between the injury and a disease developing years afterwards, it is very evident that a large, if not almost limitless, field is opened up for speculation by juries in a region where there can be no guide and no probability of just results.

In the present case, however, there was other testimony besides the general testimony above referred to. Dr. E. J. Donohue, who treated the plaintiff for his injuries from the day of the accident in January, 1911, until some time in April following, and gave him a thorough physical examination, including an examination of the sputum, about two weeks before the trial in July, 1912, testified directly as follows:

"Such an injury as the one he sustained would cause tuberculosis. It would decrease the resisting forces, tend to give a chance for infection, and give it a chance to loom up. In other words this germ that is dormant or inactive would or can become active. In my opinion the tubercular condition that I found is the result of this injury, and he is permanently disabled from manual labor."

398 Here is direct testimony by the physician who treated the plaintiff for his injuries for months, and presumably knew more of their nature and extent than any one else. It appears that he had known the plaintiff for years, and had treated his family;

he must have been in a favorable position to judge of the actual as well as the probable effects of such an injury upon the plaintiff. He testified positively that in his opinion the tubercular condition was the result of the injury received. We are unable to say that this testimony is beyond the proper scope of expert medical testimony, and unless we can say that, it seems certain that we cannot hold that a finding that the tuberculosis condition was caused by the accident is purely conjectural.

There are no other contentions which require treatment.

By the COURT: Judgment affirmed.

399 STATE OF WISCONSIN:

In Supreme Court.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.

WILLIAM H. GRAY, Defendant in Error.

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause, except such papers as are omitted pursuant to the præcipe filed herein.

That the original writ of error, the petition therefor and order allowing the same, the citation with its service endorsed thereon, the assignment of errors, certificate of lodgment, and a copy of the bond and præcipe are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 24th day of July, A. D. 1913.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of Supreme Court, Wisconsin.

Endorsed on cover: File No. 23,813. Wisconsin Supreme Court. Term No. 232. Chicago & Northwestern Railway Company, plaintiff in error, vs. William H. Gray. Filed August 2d, 1913. File No. 23,813.

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Supreme Court of the United States

OCTOBER TERM, 1914.

No. 232.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM H. GRAY,
Defendant in Error.

**IN ERROR TO THE SUPREME COURT OF THE
STATE OF WISCONSIN.**

BRIEF OF PLAINTIFF IN ERROR.

This cause comes to this court upon writ of error, to review the decision and judgment of the Supreme Court of the State of Wisconsin, affirming a judgment of the Municipal Court of Outagamie County, Wisconsin, wherein it was adjudged that the defendant in error have and recover of the plaintiff in error judgment in the sum of Seven Thousand Nine Hundred Thirty-two Dollars and Fifty-one Cents (\$7,932.51) on account of injuries received by him while in the employ of the plaintiff in error.

STATEMENT OF THE CASE.

GENERAL STATEMENT.

On January 19, 1911, Gray was employed at Antigo, Wisconsin, by the Railway Company as an engine dispatcher or hostler (so-

called). While walking across one of the railroad tracks he was struck and injured by an engine.

This action was brought on the theory that Gray was not employed in interstate commerce, and that liability of the Railroad Company existed under the state law. The Railway Company attempted to assert the defense that Gray was employed in interstate commerce, and that the Federal Employers' Liability Act was applicable. The trial court struck out the testimony offered by the Railway Company to establish employment in interstate commerce. The Supreme Court of Wisconsin affirmed this ruling on the ground that the testimony so struck out did not tend to establish that Gray was employed in interstate commerce.

Therefore, the question herein involved is as to whether or not Gray's employment constituted "employment in interstate commerce."

PHYSICAL SITUATION.

Antigo is situated in the eastern central part of Wisconsin. It is on the line of railroad running southward to Chicago, Ill., and running northward to points in the upper Peninsula of Michigan, and also through the State of Michigan to the City of Ashland upon Lake Superior.

The premises surrounding the place of accident are shown on the map opposite page 284 of the Transcript. The central object shown is the roundhouse. East of this, running north and south, are the main tracks and the railroad yards. Running from the roundhouse track south, and connecting with the main tracks south of Third Street, are two principal tracks, one of which is the roundhouse track. To the west of the roundhouse track is the coal shed. To the east of the roundhouse track are the following structures, to-wit: wood bin, water tank, sand house, rest room and blow-off box. On the roundhouse track, extending south from a point nearly opposite the south end of the coal shed, is the clinker pit. This is a pit dug under the track, having stone walls on the west side and north and south ends, but being open on the east side. East of this clinker pit is a depressed track, extending from the north end thereof southerly and joining the roundhouse track on an ascending grade near Third Street. Gondola cars are run in on the depressed track,

and the cinders shoveled into these cars from the clinker or cinder pit. The photograph shown opposite page 285 of the transcript gives a view of this clinker pit looking towards the south.

GRAY'S DUTIES.

The allegations of the complaint (which are supported by the testimony) establish Gray's duties as follows:

(a) To receive the engines when brought into the yards upon their return from trips between various other places and the City of Antigo.

(b) To cause the fire and ashes to be emptied from the fireplace of such engines into the cinder pit, and assisting in the emptying thereof.

(c) To cause the water and steam in the boiler of each engine to be reduced by discharging the same into the blow-off box.

(d) To load the engine with coal from the coal shed.

(e) To fill the engine with water from the water tank.

(f) To load the tender of the engine with kindling wood from the wood pile.

(g) To run each engine so received and dealt with into the roundhouse for housing.

(h) *To occasionally drive the engines in switching cars loaded with freight, wood, cinders and other materials and cars in bad order and about the yards.*

(i) To guard, care for and protect the property of the Railway Company, and "*particularly said cinder pit and its immediate surroundings.*"

(j) *To prevent the damage or destruction of said property by fire or other cause.*

(k) To promote and further the interests and welfare of the Railroad Company in and about the yards generally.

(Transcript p. 13.)

Previous to the accident, on the morning in question, several engines had been brought in and put over the cinder pit and their hot coals dumped therein.

The following testimony is material on the question of Gray's duties.

"Q. Isn't it a fact that there is frequently rising from this cinder pit vapor, smoke and steam.

A. Yes, sir.

Q. Engines are cleaned and the fire knocked out on the pit every day, are they not?

A. Yes, sir.

Q. And a good many of them?

A. Yes, sir.

Q. And these coals among them have live coals which hold fire for a considerable length of time?

A. Yes, sir."

(Transcript p. 36.)

"Q. What was the condition of things at the cinder pit that morning?

A. The cinder pit was full of cinders almost; at places it was filled, at other places a little lower, and so on through the pit.

Q. What was the condition with reference to whether or not there were live cinders in it?

A. Yes, there was fire in them.

Q. Go right on and tell the condition of the fire and all about it.

A. *It threw up smoke and gas and steam, a certain amount of steam, made it very disagreeable to work there.*

Q. That was true on that morning?

A. Yes, sir.

Q. *Did you give any directions with reference to quenching the cinders?*

A. Yes, sir.

Q. What did you say?

A. Told the cinder pit man to put the hose on there and put the fire out, *that the stringers would get hot and some big engine would be liable to come along and get into the pit.*

Q. Did he do so?

A. Yes, sir.

Q. *What did you have this hose there for?*

A. *To wet the cinders down.*

Q. *Was that a condition that prevailed frequently?*

A. Yes, sir.

Q. *Live cinders on the pit that you had to wet down?*

A. *Yes, that is, generally there is live coals in the engine in the*

fire box, and you will get an engine once in a while that the fire will be practically out in the fire box.

Q. In other words, whatever fire is in an engine at the end of a trip is knocked out on the cinder pit?

A. Yes, sir.

Q. You said you had been at the round house and came down to this cinder pit. What did you go there for?

A. I went to the sand house and I went down to see if those men were putting the fire out properly.

Q. What did you find the condition to be there then?

A. I found the man standing there with his back towards the shed or a little towards the south with the hose in his hands putting the fire out. I looked at him for a short while and started back to the shanty."

(Transcript pp. 66 and 67.)

"Q. But when you came to hostle 114 the fumes and smoke from the dump bothered you when you were on the engine?

A. Yes, sir.

Q. And that time just before you moved the engine off the cinder pit you told Krieska to throw water on there, did you?

A. Yes, sir.

Q. That hose was kept there and used constantly for that purpose?

A. Yes, that is what it was there for.

Q. One of the ordinary operations wasn't it—that when you were dumping coal some one would pour water right on it the same time?

A. Yes, sir.

Q. Who generally did that?

A. The cinder pit man.

Q. Had they been doing it all that morning or not?

A. No, sir.

Q. They had not been doing it?

A. They hadn't been doing it the way they ought to.

Q. Were the cinder pit men under your directions?

A. I was supposed to look after the interest of the pit and the surroundings.

Q. You had to take care of the coal so that it would not interfere with the dispatching of the engines?

A. Yes, sir.

Q. And you had a right to tell him what to do about that and you did tell him, did you?

A. Yes, sir."

(Transcript pp. 82 and 83.)

MANNER OF ACCIDENT.

As stated, several engines had had their fire dumped over the cinder pit early in the morning, and pretty well filled the same up with hot cinders, which were afire. When the last engine previous to the accident was dumped, it had thrown fumes up so as to make it difficult to handle the engines on the cinder pit, and also it was endangering the steel cross ties and supports to the rails over the cinder pit.

Gray directed his cinder pit man to throw water, by means of the hose, on to the cinder pit so as to cool it off, and not let the stringers get hot so that any engine would be liable to go down into the pit. (Transcript pp. 66, 82 and 83.)

After giving these directions Gray went up town near the depot to get his time check cashed. (Transcript pp. 84 and 85.) He returned direct from town to the roundhouse. (Transcript p. 89.) From the roundhouse he walked south on the roundhouse track to the cinder pit, where he went for the purpose of seeing whether his orders as to the wetting down of the cinders were being carried out. (Transcript p. 67.)

As the Supreme Court of Wisconsin says:

"When he left the roundhouse he saw so much steam and smoke rising from the cinder pit that he concluded that he ought to ascertain whether the cinder pit man, Krieska, was performing his duty in putting out the fire in the cinder pit."

(Transcript p. 287.)

He there found the cinder pit man, Krieska, throwing water on the hot cinders with the hose; he looked at him a short while and started back to his shanty or rest room. (Transcript p. 67.) The wind was in the south, and there was considerable smoke and steam coming off from the cinders blowing north along the roundhouse track and east of the coal shed. He walked between the coal shed and the track to a point nearly opposite his shanty or rest room. He was then surrounded by steam and smoke. He stopped and listened for a second, and hearing nothing started to cross the track, when he was struck and injured by a light engine coming from the south.

Thus we see that the last duty performed by Gray prior to his accident was his visit to the cinder pit to ascertain whether his orders

and instructions were being carried out, and that he was injured while returning therefrom to his shanty or rest room.

ISSUES AND TRIAL.

Up to the time when the defendant took the case there was no testimony directly showing that the Railway Company and its engines were engaged or employed in Interstate Commerce at the place in question.

Defendant called R. F. Armstrong to the stand and asked him the following questions:

"Q. At and prior to the plaintiff's accident was the North Western Road, its trains, engines and employes engaged in hauling cars of freight continuously between Michigan, and State of Wisconsin and points in Illinois and State of Wisconsin?

A. Yes, sir."

(Transcript p. 236.)

Upon motion this answer was struck out, the court assigning the reason as follows:

"The only question is as to *this* engine as I can see it; *the engine on which this person was engaged at the time.*"

(Transcript pp. 236 and 237.)

Thereupon the following testimony was given by Mr. Armstrong without objection, to-wit:

"The engines being hostled at this roundhouse were making trips from Antigo to Ashland, *going through the State of Michigan*; some of the engines and trains were making connection with the Watersmeet branch (in Michigan). While the engines going south would not run outside of the state, yet they handled refrigerator cars from Chicago; the dispatcher works under the supervision of the foreman of the roundhouse; the roundhouse is a place where all these engines come in from runs to rest; they are cleaned of all their coal and cinders and supplied with wood and water, etc., for the next trip; some light repairs are done in the roundhouse; the dispatcher takes the engine after the train crew leaves it and does these very things, and then puts it in the roundhouse."

(Transcript p. 237.)

Thereupon the plaintiff's attorney moved to strike out all of the last above testimony in so far as it related to interstate traffic, and tended to show employment in Interstate Commerce, *which motion was granted.* (Transcript p. 238.)

Thereafter the case was submitted to the jury under a special verdict in accordance with the Wisconsin Railroad Law.

(Transcript pp. 269 and 270.)

Defendant duly moved for a new trial because of errors of the court (among other things) in the exclusion of testimony. (Transcript p. 272.) This motion was denied and exception taken. (Transcript pp. 273-274.)

Thereupon an appeal was duly taken to the Supreme Court of the State of Wisconsin.

DECISION OF WISCONSIN SUPREME COURT.

The opinion of the Wisconsin Supreme Court (Transcript pp. 286-293) discloses that in that court the Railway Company assigned as error the ruling of the Trial Court "in refusing to receive evidence tending to show that plaintiff was employed in interstate commerce at the time of his injury." (Transcript p. 289.)

The following is that part of the court's opinion:

"III. The complaint does not allege that the defendant was engaged in Interstate Commerce or that the engine in question had been handling an interstate train, but simply that the defendant was operating trains and was carrying passengers and freight for hire between Antigo and other cities and villages in Wisconsin; neither did the plaintiff's evidence show that the defendant was transacting an interstate business. When the defendant took the case, however, *it offered to show that it and its trains, engines and employes were engaged in hauling cars of freight continuously over this line between points in Illinois, Michigan and Wisconsin at and prior to the time of the accident; that the engines which were being dispatched at this roundhouse at the time in question were making trips through Michigan to Ashland, making connections with the Watersmeet branch; that the engines running south wouldn't run outside the state; that those going and coming from the south handled refrigerator cars from Chicago. No offer was made to show that the engine in question had been hauling an interstate train or interstate freight, nor that all the*

engines dispatched at this roundhouse hauled interstate freight or interstate trains. Part of the testimony was received against objection, but ultimately it was all stricken out, and so the question whether the federal employers' liability act controlled the present case was eliminated from the case.

An attempt is made by the respondent to justify this ruling on the ground that the testimony was incompetent and immaterial, because there is no claim made in the answer that the plaintiff was employed in interstate commerce at the time of his injury. We should be slow to hold to so strict and technical a rule. The statutes of the United States are the law of the land, and not like the statutes of our sister states which must be pleaded and proven in order to be available. Furthermore, the fact that the great railroad systems of the state are continuously engaged in both kinds of commerce must, we think, be so well known as to be matter of common knowledge. We do not find it necessary to decide this question, however, as we are of opinion that the ruling was right on the merits. As it was pointed out in the recent case of *Ruck vs. C. M. & St. P. Ry. Co.* (present term, 140 N. W. Rep., 1074), it is necessary in order to bring a case within the federal act not only that the employer be engaged in interstate commerce, but that the injured employee shall suffer his injury 'while he is employed' in interstate commerce. *Taking care of an engine after it has completed its run and preparing it for the roundhouse seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply repairing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce.* *Ruck vs. C. M. & St. P. Ry. Co.* (supra).

We think there is a stronger ground, however, upon which the ruling of the trial court may be sustained. It appears that the plaintiff at the time of the accident here was walking back to his rest shanty, and was doing nothing at all in the way of dispatching engines. Now it may perhaps be correctly held (though we do not decide the question) that a man whose day is spent in dispatching engines all of which are engaged in interstate commerce is in legal effect employed in interstate commerce during the whole day and including the periods of leisure or rest when he is doing nothing but waiting for the arrival of an engine; but if, on the other hand, part of the engines dispatched be engaged in interstate business and part in local or intrastate business, we are unable to see how it could be logically said that he was "employed in interstate commerce" all day or during his intervals of leisure. In the present case, as we have seen, there was no offer to show that all the engines dispatched daily by the plaintiff were engaged in interstate commerce. As said before in this opinion, we think it must be considered a matter of common knowledge that

the great railroad systems of the present day are engaged in both interstate and intrastate commerce all the time and side by side. The offer of proof in this case went little, if any, further than this. It was noticeably guarded and indefinite in its purport; every word of it might be admitted to be true and yet it would not be shown that all the engines dispatched at this roundhouse by the plaintiff were engaged in interstate business, or even that the engine in question had been so engaged. The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish *the fact that the plaintiff's ENTIRE work consisted of the dispatching of engines engaged in interstate commerce*. Error must appear affirmatively—it is not to be presumed. We conclude, therefore, that there was no error in these rulings.”

SPECIFICATION OF ERRORS.

First: The Supreme Court erred in construing that Act of Congress, to-wit, the Act of April 22, 1908, 35 Statutes, 65, Chapter 149, and the amendment thereof under date of April 5, 1910, 36 Statutes, 290, commonly known as the Federal Employers' Liability Act, and in denying to the Plaintiff in Error the right, privilege and immunity specially set up and claimed by it under the said Act aforesaid, which errors are more particularly set forth as follows, to-wit:

The Supreme Court of Wisconsin erred in holding and deciding:

First: That the employment in which the said William H. Gray was engaged at the time of his injury under the evidence admitted and offered did not constitute *employment in commerce between the several states*.

Second: That the said William H. Gray, under the evidence admitted and offered, was not injured while employed in commerce between the several states.

Third: That in order to constitute “employment in commerce between the several states” an engine dispatcher must be employed exclusively in dispatching engines in interstate commerce; that an engine dispatcher whose duties require him to dispatch alternatively engines engaged in intrastate and interstate commerce, if injured while waiting for engines to be turned over to him to be dispatched,

is not then "employed in commerce between the several states," and such employe is not injured "while he is employed in commerce between the several states"; that the employment of an engine dispatcher in taking care of engines immediately after their return from interstate trips does not constitute "employment in commerce between the several states." (See Assignment of Errors, Transcript pp. 2 and 3.)

ARGUMENT.

But one question is presented by this record, and that is the following:

Was William H. Gray, under the Evidence Admitted, and the Evidence Excluded, Employed in Interstate Commerce?

Restating the material facts, they are as follows:

First: The Railway Company, at the time and place, was engaged in Interstate Commerce.

Second: The engines dispatched at the roundhouse at Antigo hauled trains to Ashland through Michigan and also to the Watersmeet branch in Michigan; hauled trains bound to and from Chicago, some of which contained refrigerator cars and interstate freight; no proof that *all* engines at *all* times handled interstate freight.

Third: The duties of Gray and his assistants were to take engines coming in off the road, dump their cinders in the cinder pit, fill them with coal and water and kindling, and then house them in the roundhouse; *keep the cinders shoveled out of the cinder pit; keep the cinders wet down with water and free from fire so as not to destroy the rails and ties over the cinder pit and endanger the engines; to exercise authority and jurisdiction over the cinder pit man; to look after, watch, guard and protect the cinder pit.*

Fourth: On the morning in question the accumulation of hot cinders had endangered the cinder pit. Gray gave orders that they be wet down and cooled off; while waiting for another engine to arrive which he could dispatch *he went to the cinder pit to observe the con-*

dition thereof and see whether his orders were being carried out, and when returning therefrom to his shanty to wait for another engine to be dispatched he received the injury in question.

The "employment" of Gray has two aspects:

First: He must clean, coal, water and house both state and interstate engines. From necessity each engine must be handled separately.

Second: He must maintain, watch over and keep in condition the cinder pit and the ties and rails thereover; he must keep the cinders shoveled out of the cinder pit, keep them wetted down and cooled, so the heat and fire will not destroy the rails and the steel ties. Otherwise, his engines while being cleaned, may fall into the pit.

We submit that his employment, in its second aspect, does not differ in any respect from the employment of the bridge repairer, or the section man, who is repairing or maintaining that part of the permanent system of the railroad which is devoted to intrastate and interstate commerce.

Within the rule of the Pederson case, 229 U. S., 146, Gray was employed, while performing these duties, in interstate commerce.

While the citation of this case should be deemed sufficient, yet we desire to call the court's attention to applications of the rule, and principle thereof, by other and inferior tribunals.

In *Barlow vs. Lehigh Railway Company*, 143 N. Y. Supp., 1053, where an employe was switching coal, which was to be used by both state and interstate engines indiscriminately, it was held that he was employed in interstate commerce.

So the unloading of oil intended to be used as fuel for state and interstate engines constitutes interstate employment.

Montgomery Southern Pacific Railway Company, 131 Pac., 507.

Where a pumper who pumped water in tanks, from which state and interstate engines drew their water, was injured, while riding on his hand car to work, his employment was held to be interstate.

Horton vs. Oregon Navigation Company, 130 Pac., 897.

The wheeling of coal to be used for a repair shop where state and interstate engines were repaired constitutes interstate employment.

Cousins vs. Illinois Central Railway Company, 148 N. W., p. 58.

In the Merkl Case, 198 Fed., 1, (C. C. A.) the employe was engaged in repairing a refrigerator car which was indiscriminately used in both kinds of service, sometimes in one and sometimes in the other.

Held that he was employed in interstate commerce.

Also *Missouri K. & T. Ry. vs. Demahy Co.*, 165 S. W., 529;
Winters vs. Minneapolis & St. L. R. Co., 148 N. W., 106.

Thus it seems clear that if Gray had been injured *while standing at the cinder pit, and actually engaged in supervising the wetting down of the cinders*, there could be no question but that he was then employed in interstate commerce. It matters not, under the authorities as we read them, that at the moment of injury he was *walking to or from his place of employment*.

North Carolina Railway Company vs. Zachary, 232 U. S., 248.
St. Louis, San Francisco & T. Ry. Co. vs. Seale, 229 U. S. 156.
I. C. R. Co. vs. Nelson, 203 Fed., 951 (C. C. A.);
Lamphere Case, 196 Fed., 336;
Rentz Case, 162 S. W., 959;
San Pedro Railway Co. vs. Davide, 210 Fed., 870 (C. C. A.);
St. Louis & Southwestern Railway Company vs. Brothers, 165 S. W., 488;
Sanders vs. Charleston Railway Company, 81 S. E. 283.

I further submit that his employment, in its first aspect, constitutes interstate employment. At the moment of his injury he was returning to his rest shanty, where he would await the arrival of another engine. It was not shown, and then probably could not be known, whether such engine would be one hauling interstate freight or intrastate freight. He would not only handle that engine, but all others that would come after it later in the day. This was early in the day.

As stated by the Wisconsin Supreme Court in its opinion (Transcript p. 287), about thirty engines were dispatched each twenty-four hours. While going to such work, or waiting for it, his employment was as much interstate commerce as if it were definitely ascertained that the very next engine would be an interstate engine. It was his duty then to await and dispatch all of the engines then out on the road running towards Antigo, both state and interstate. It seems ridiculous to argue that the character of his employment during the period of waiting must be determined by the merest chance that the next arriving engine is either an intrastate or an interstate engine. It is likewise ridiculous to argue that the character of his employment is changed because of the fact that these engines arrived singly rather than in numbers, constituting a train.

We submit that the case is identical with the situation in *St. Louis, San Francisco & T. Ry. Co. vs. Seale*, 229 U. S., 156.

There a car checker was going through the yards to a place where he was to await the arrival of a train which would bring both state and interstate cars. It was his duty to examine the cars, make a record of the numbers and initials, and to inspect and make a record of the seals on the car doors. Of course, he had to handle each car separately. It might well have been argued in that case that because he had to handle each car separately he was not, while approaching his work, engaged in interstate commerce.

This court, however, held, as stated in the syllabus:

"An employe, whose duty is to take numbers of and seal up and label cars, some of which are engaged in interstate and some in intrastate traffic is directly, and not indirectly, engaged in interstate commerce."

I submit that the mere fact that these mixed cars arrived in a single train is wholly immaterial. Thus we conclude that in both of its aspects Gray's employment was interstate.

It may be profitable to discuss the opinion of the State Supreme Court. That case was argued April 30th and decided May 31st, 1913. Both the Pederson and the Seale cases, *supra*, were decided May 26, 1913, only five days before the decision in this case, and these decisions were not then published or known.

At that time the law was in a state of great uncertainty. But

little had been said by this court on the question as to what constituted interstate employment. The State Courts were groping around trying to find the light. Just previous to the decision in this case the Wisconsin Supreme Court had decided the case of Ruck vs. C. M. & St. Paul Railway Company, 153 Wis., 158, wherein it held that a mechanic, who was injured while engaged in repairing a wrecker outfit, which outfit at times was used in both intrastate and interstate commerce, was not employed in interstate commerce.

The case did not go on the proposition that the wrecker outfit was alternately used for both kinds of commerce, but went on the point that work in making repairs on mere appliances or premises was too remote from the actual moving of interstate commerce to constitute employment therein. From the cases above cited it now seems obvious that this was an erroneous deduction.

In addition to the cases already cited see the following cases on the question of repairing appliances and premises used in interstate commerce.

Gaines vs. Detroit Railway Company, 148 N. W., 397.

Freeman, Receiver, vs. Powell, 144 S. W., 1033.

Zachary Case, 232 U. S., 248.

Eng vs. Southern Pacific, 210 Fed., 92.

Armbruster Case, 147 N. W., 338.

In the latter case it is held that the coaling of an engine to go out on an interstate trip constitutes interstate employment.

Most, if not all of these cases, draw their inspiration and application from the Pederson and Seale cases, and it is now clearly apparent that the Ruck case was wrongfully decided by the Wisconsin Supreme Court.

In *Graber vs. Duluth, South Shore & Atlantic Ry.*, 150 N. W., p. 429 decided Jan. 12, 1915, the Wisconsin Supreme Court cited the Pederson, Zachary and Behrens (233 U. S., 473) Cases.

There a brakeman arrived at the terminal on an interstate train, finished up his train work, went from the Railroad Company premises to get a drink of liquor, and was injured while crossing the railroad yards to go to the depot to meet his conductor and ascertain if there were any further orders, and the court held that at the time of the injury he was engaged in interstate commerce. This case should be

read to understand the new view of the law taken by the Wisconsin Supreme Court.

Starting with the false premise adopted by it in the Ruck case, the Wisconsin Supreme Court makes its first proposition (Transcript p. 291), to-wit:

"Taking care of an engine after it has completed its run, and preparing it for the roundhouse, seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply preparing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce."

The Court then proceeds to its next premise, which we see from the above authorities is likewise false. This is, that one, while awaiting the arrival of other engines which may be state or interstate, cannot be said to be "employed in interstate commerce" during the hours of his *leisure*.

The court concludes as follows:

"The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish the fact that the plaintiff's *entire work* consisted of dispatching engines engaged in interstate commerce."

(Transcript, p. 291.)

It should be specially noted that the Wisconsin Supreme Court did not fully state the facts in relation to, or discuss, what we have herein called the "second aspect" of Gray's employment. It probably considered this immaterial because of the view of the first premise, to-wit, the dispatching of an engine was like repairing it and, therefore, the maintenance and repairs of the cinder pit and track thereover were of the same character.

In *Colasurdo vs. Central Railway Company*, 180 Fed., 832; affirmed, 192 Fed., 901 (C. C. A.), followed and approved in *Horton vs. Oregon Navigation Company*, 130 Pac., 897, the Court, in referring to the Federal Employers' Liability Act, and the construction placed thereon by this court, well said:

"The Act meant to include everybody whom Congress *could* include."

It seems to us that this is the true test. The question then is, can it be held, by any reasonable construction, that Gray's employment was interstate. It is almost a matter of common knowledge that on the main lines of the great interstate railroads, like the Chicago and North Western Railroad, the great bulk of the business in interstate. The products of the forest, the factory and the farm must be carried into the great interstate markets. The return trips of the cars must bring in the manufactured products of the great industrial centers, the meats, the oils, clothing, boots and shoes, coffees, teas and refrigerated foods. It was Gray's duty to handle every engine (during his portion of the day) that hauled all this great bulk of commerce. He must maintain his appliances, his bars and picks and rods, his cinder pit, his track and premises so as to carry on this work. The employment is single and entire. When he is going to the premises in the morning and returning at night he is approaching and returning from one employment, not two. It is unreasonable to say or to hold that because by chance some engine may haul a passenger train on which there is no interstate passenger, or a freight train on which there is no interstate shipment, therefore, while waiting between the arrival of trains he is not engaged in interstate commerce. *Reducing the argument to an absurdity, it must likewise follow that while waiting he is not employed in intrastate commerce.*

Therefore, we submit that in both of its aspects Gray's employment was interstate, and the Wisconsin Supreme Court erred in its holding to the contrary.

EDWARD M. SMART,

*Solicitor and Counsel for Plaintiff in Error,
Chicago and North Western Railway Company.*

Service of the foregoing brief is hereby accepted and delivery
a copy thereof is hereby acknowledged this day
February, A. D. 1915.

.....
Attorney for Plaintiff in Error.

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Attorney for Defendant in Error.

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Supreme Court of the United States

OCTOBER TERM, 1914.

No. 232.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,

Plaintiff in Error,

VS.

WILLIAM H. GRAY,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF WISCONSIN.

AMENDED BRIEF OF PLAINTIFF IN ERROR.

This cause comes to this court upon writ of error, to review the decision and judgment of the Supreme Court of the State of Wisconsin, affirming a judgment of the Municipal Court of Outagamie County, Wisconsin, wherein it was adjudged that the defendant in error have and recover of the plaintiff in error judgment in the sum of Seven Thousand Nine Hundred Thirty-two Dollars and Fifty-one Cents (\$7,932.51) on account of injuries received by him while in the employ of the plaintiff in error.

STATEMENT OF THE CASE.

GENERAL STATEMENT.

On January 19, 1911, Gray was employed at Antigo, Wisconsin, by the Railway Company as an engineer dispatcher or hostler (so-

called). While walking across one of the railroad tracks he was struck and injured by an engine.

This action was brought on the theory that Gray was not employed in interstate commerce, and that liability of the Railroad Company existed under the state law. The Railway Company attempted to assert the defense that Gray was employed in interstate commerce, and that the Federal Employers' Liability Act was applicable. The trial court struck out the testimony offered by the Railway Company to establish employment in interstate commerce. The Supreme Court of Wisconsin affirmed this ruling on the ground that the testimony so struck out did not tend to establish that Gray was employed in interstate commerce.

Therefore, the question herein involved is as to whether or not Gray's employment constituted "employment in interstate commerce."

PHYSICAL SITUATION.

Antigo is situated in the eastern central part of Wisconsin. It is on the line of railroad running southward to Chicago, Ill., and running northward to points in the upper Peninsula of Michigan, and also through the State of Michigan to the City of Ashland upon Lake Superior.

The premises surrounding the place of accident are shown on the map opposite page 284 of the Transcript. The central object shown is the roundhouse. East of this, running north and south, are the main tracks and the railroad yards. Running from the roundhouse track south, and connecting with the main tracks south of Third Street, are two principal tracks, one of which is the roundhouse track. To the west of the roundhouse track is the coal shed. To the east of the roundhouse track are the following structures, to-wit: wood bin, water tank, sand house, rest room and blow-off box. On the roundhouse track, extending south from a point nearly opposite the south end of the coal shed, is the clinker pit. This is a pit dug under the track, having stone walls on the west side and north and south ends, but being open on the east side. East of this clinker pit is a depressed track, extending from the north end thereof southerly and joining the roundhouse track on an ascending grade near Third Street. Gondola cars are run in on the depressed track,

and the cinders shoveled into these cars from the clinker or cinder pit. The photograph shown opposite page 285 of the transcript gives a view of this clinker pit looking towards the south.

GRAY'S DUTIES.

The allegations of the complaint (which are supported by the testimony) establish Gray's duties as follows:

(a) To receive the engines when brought into the yards upon their return from trips between various other places and the City of Antigo.

(b) To cause the fire and ashes to be emptied from the fireplace of such engines into the cinder pit, and assisting in the emptying thereof.

(c) To cause the water and steam in the boiler of each engine to be reduced by discharging the same into the blow-off box.

(d) To load the engine with coal from the coal shed.

(e) To fill the engine with water from the water tank.

(f) To load the tender of the engine with kindling wood from the wood pile.

(g) To run each engine so received and dealt with into the roundhouse for housing.

(h) *To occasionally drive the engines in switching cars loaded with freight, wood, cinders and other materials and cars in bad order and about the yards.*

(i) To guard, care for and protect the property of the Railway Company, and "*particularly said cinder pit and its immediate surroundings.*"

(j) *To prevent the damage or destruction of said property by fire or other cause.*

(k) To promote and further the interests and welfare of the Railroad Company in and about the yards generally.

(Transcript p. 13.)

Previous to the accident, on the morning in question, several engines had been brought in and put over the cinder pit and their hot coals dumped therein.

The following testimony is material on the question of Gray's duties.

"Q. Isn't it a fact that there is frequently rising from this cinder pit vapor, smoke and steam?

A. Yes, sir.

Q. Engines are cleaned and the fire knocked out on the pit every day, are they not?

A. Yes, sir.

Q. And a good many of them?

A. Yes, sir.

Q. And these coals among them have live coals which hold fire for a considerable length of time?

A. Yes, sir."

(Transcript p. 36.)

"Q. What was the condition of things at the cinder pit that morning?

A. The cinder pit was full of cinders almost; at places it was filled, at other places a little lower, and so on through the pit.

Q. What was the condition with reference to whether or not there was live cinders in it?

A. Yes, there was fire in them.

Q. Go right on and tell the condition of the fire and all about it.

A. *It threw up smoke and gas and steam, a certain amount of steam, made it very disagreeable to work there.*

Q. That was true on that morning?

A. Yes, sir.

Q. *Did you give any directions with reference to quenching the cinders?*

A. Yes, sir.

Q. What did you say?

A. *Told the cinder pit man to put the hose on there and put the fire out, that the stringers would get hot and some big engine would be liable to come along and get into the pit.*

Q. Did he do so?

A. Yes, sir.

Q. *What did you have this hose there for?*

A. *To wet the cinder down.*

Q. *Was that a condition that prevailed frequently?*

A. Yes, sir.

Q. *Live cinders on the pit that you had to wet down?*

A. *Yes, that is, generally there is live coals in the engine in the*

fire box, and you will get an engine once in a while that the fire will be practically out in the fire box.

Q. *In other words, whatever fire is in an engine at the end of a trip is knocked out on the cinder pit?*

A. *Yes, sir.*

Q. *You said you had been at the round house and came down to this cinder pit. What did you go there for?*

A. *I went to the sand house and I went down to see if those men were putting the fire out properly.*

Q. *What did you find the condition to be there then?*

A. *I found the man standing there with his back towards the shed or a little towards the south with the hose in his hands putting the fire out. I looked at him for a short while and started back to the shanty."*

(Transcript pp. 66 and 67.)

"Q. But when you came to hostile 114 the fumes and smoke from the dump bothered you when you were on the engine?

A. *Yes, sir.*

Q. And that time just before you moved the engine off the cinder pit you told Krieska to throw water on there, did you?

A. *Yes, sir.*

Q. *That hose was kept there and used constantly for that purpose?*

A. *Yes, that is what it was there for.*

Q. One of the ordinary operations wasn't it—that when you were dumping coal some one would pour water right on it the same time?

A. *Yes, sir.*

Q. Who generally did that?

A. *The cinder pit man.*

Q. Had they been doing it all that morning or not?

A. *No, sir.*

Q. They had not been doing it?

A. *They hadn't been doing it the way they ought to.*

Q. Were the cinder pit men under your directions?

A. *I was supposed to look after the interest of the pit and the surroundings.*

Q. *You had to take care of the coal so that it would not interfere with the dispatching of the engines?*

A. *Yes, sir.*

Q. *And you had a right to tell him what to do about that and you did tell him, did you?*

A. *Yes, sir."*

(Transcript pp. 82 and 83.)

MANNER OF ACCIDENT.

As stated, several engines had had their fire dumped over the cinder pit early in the morning, and pretty well filled the same up with hot cinders, which were afire. When the last engine previous to the accident was dumped, it had thrown fumes up so as to make it difficult to handle the engines in the cinder pit, and also it was endangering the steel cross ties and supports to the rails over the cinder pit.

Gray directed his cinder pit man to throw water, by means of the hose, on to the cinder pit so as to cool it off, and not let the stringers get hot so that any engine would be liable to go down into the pit. (Transcript pp. 66, 82 and 83.)

After giving these directions Gray went up town near the depot to get his time check cashed. (Transcript pp. 84 and 85.) He returned direct from town to the roundhouse. (Transcript p. 89.) From the roundhouse he walked south on the roundhouse track to the cinder pit, where he went for the purpose of seeing whether his orders as to the wetting down of the cinders were being carried out. (Transcript p. 67.)

As the Supreme Court of Wisconsin says:

"When he left the roundhouse he saw so much steam and smoke rising from the cinder pit that he concluded that he ought to ascertain whether the cinder pit man, Krieska, was performing his duty in putting out the fire in the cinder pit."

(Transcript p. 287.)

He there found the cinder pit man, Krieska, throwing water on the hot cinders with the hose; he looked at him a short while and started back to his shanty or rest room. (Transcript p. 67.) The wind was in the south, and there was considerable smoke and steam coming off from the cinders blowing north along the roundhouse track and east of the coal shed. He walked between the coal shed and the track to a point nearly opposite his shanty or rest room. He was then surrounded by steam and smoke. He stopped and listened for a second, and hearing nothing started to cross the track, when he was struck and injured by a light engine coming from the south.

Thus we see that the last duty performed by Gray prior to his accident was his visit to the cinder pit to ascertain whether his orders

and instructions were being carried out, and that he was injured while returning therefrom to his shanty or rest room.

ISSUES AND TRIAL.

Up to the time when the defendant took the case there was no testimony directly showing that the Railway Company and its engines were engaged or employed in Interstate Commerce at the place in question.

Defendant called R. F. Armstrong to the stand and asked him the following questions:

"Q. At and prior to the plaintiff's accident was the North Western Road, its trains, engines and employes engaged in hauling cars of freight continuously between Michigan, and State of Wisconsin and points in Illinois and State of Wisconsin?"

A. Yes, sir."

(Transcript p. 236.)

Upon motion this answer was struck out, the court assigning the reason as follows:

"The only question is as to *this* engine as I can see it; *the engine on which this person was engaged at the time.*"

(Transcript pp. 236 and 237.)

Thereupon the following testimony was given by Mr. Armstrong without objection, to-wit:

"The engines being hostled at this roundhouse were making trips from Antigo to Ashland, *going through the State of Michigan*; some of the engines and trains were making connection with the Watersmeet branch (in Michigan). While the engines going south would not run outside of the state, yet they handled refrigerator cars from Chicago; the dispatcher works under the supervision of the foreman of the roundhouse; the roundhouse is a place where all these engines come in from runs to rest; they are cleaned of all their coal and cinders and supplied with wood and water, etc., for the next trip; some light repairs are done in the roundhouse; the dispatcher takes the engine after the train crew leaves it and does these very things, and then puts it in the roundhouse."

(Transcript p. 237.)

Thereupon the plaintiff's attorney moved to strike out all of the last above testimony in so far as it related to interstate traffic, and tended to show employment in Interstate Commerce, *which motion was granted.* (Transcript p. 238.)

Thereafter the case was submitted to the jury under a special verdict in accordance with the Wisconsin Railroad Law.

(Transcript pp. 269 and 270.)

Defendant duly moved for a new trial because of errors of the court (among other things) in the exclusion of testimony. (Transcript (p. 272). This motion was denied and exception taken. (Transcript pp. 273-274.)

Thereupon an appeal was duly taken to the Supreme Court of the State of Wisconsin.

DECISION OF WISCONSIN SUPREME COURT.

The opinion of the Wisconsin Supreme Court (Transcript pp. 286-293) discloses that in that court the Railway Company assigned as error the ruling of the Trial Court "in refusing to receive evidence tending to show that plaintiff was employed in interstate commerce at the time of his injury." (Transcript p. 289.)

The following is that part of the court's opinion:

"III. The complaint does not allege that the defendant was engaged in Interstate Commerce or that the engine in question had been handling an interstate train, but simply that the defendant was operating trains and was carrying passengers and freight for hire between Antigo and other cities and villages in Wisconsin; neither did the plaintiff's evidence show that the defendant was transacting an interstate business. When the defendant took the case, however, it offered to show that it and its trains, engines and employes were engaged in hauling cars of freight continuously over this line between points in Illinois, Michigan and Wisconsin at and prior to the time of the accident; that the engines which were being dispatched at this roundhouse at the time in question were making trips through Michigan to Ashland, making connections with the Watersmeet branch; that the engines running south wouldn't run outside the state; that those going and coming from the south handled refrigerator cars from Chicago. No offer was made to show that the engine in question had been hauling an interstate train or interstate freight, nor that all the

engines dispatched at this roundhouse hauled interstate freight or interstate trains. Part of the testimony was received against objection, but ultimately it was stricken out, and so the question whether the federal employers' liability act controlled the present case was eliminated from the case.

An attempt is made by the respondent to justify this ruling on the ground that the testimony was incompetent and immaterial, because there is no claim made in the answer that the plaintiff was employed in interstate commerce at the time of his injury. We should be slow to hold to so strict and technical a rule. The statutes of the United States are the law of the land, and not like the statutes of our sister states which must be pleaded and proven in order to be available. Furthermore, the fact that the great railroad systems of the state are continuously engaged in both kinds of commerce must, we think, be so well known as to be matter of common knowledge. We do not find it necessary to decide this question, however, as we are of opinion that the ruling was right on the merits. As it was pointed out in the recent case of *Ruck vs. C. M. & St. P. Ry. Co.* (present term, 140 N. W. Rep., 1074), it is necessary in order to bring a case within the federal act not only that the employer be engaged in interstate commerce, but that the injured employee shall suffer his injury 'while he is employed' in interstate commerce. *Taking care of an engine after it has completed its run and preparing it for the roundhouse seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply repairing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce.* *Ruck vs. C. M. & St. P. Ry. Co.* (*supra*).

We think there is a stronger ground, however, upon which the ruling of the trial court may be sustained. It appears that the plaintiff at the time of the accident here was walking back to his rest shanty, and was doing nothing at all in the way of dispatching engines. Now it may perhaps be correctly held (though we do not decide the question) that a man whose day is spent in dispatching engines all of which are engaged in interstate commerce is in legal effect employed in interstate commerce during the whole day and including the periods of leisure or rest when he is doing nothing but waiting for the arrival of an engine; but if, on the other hand, part of the engines dispatched be engaged in interstate business and part in local or interstate business, we are unable to see how it could be logically said that he was "employed in interstate commerce" all day or during his intervals of leisure. In the present case, as we have seen, there was no offer to show that all the engines dispatched daily by the plaintiff were engaged in interstate commerce. As said before in this opinion, we think it must be considered a matter of common knowledge that

the great railroad systems of the present day are engaged in both interstate and intrastate commerce all the time and side by side. The offer of proof in this case went little, if any, further than this. It was noticeably guarded and indefinite in its purport; every word of it might be admitted to be true and yet it would not be shown that all the engines dispatched at this roundhouse by the plaintiff were engaged in interstate business; or even that the engine in question had been so engaged. The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish *the fact that the plaintiff's ENTIRE work consisted of the dispatching of engines engaged in interstate commerce.* Error must appear affirmatively—it is not to be presumed. We conclude, therefore, that there was no error in these rulings."

SPECIFICATION OF ERRORS.

First: The Supreme Court erred in construing that Act of Congress, to-wit, the Act of April 22, 1908, 35 Statutes, 65, Chapter 149, and the amendment thereof under date of April 5, 1910, 36 Statutes, 290, commonly known as the Federal Employers' Liability Act, and in denying to the Plaintiff in Error the right, privilege and immunity specially set up and claimed by it under the said Act aforesaid, which errors are more particularly set forth as follows, to-wit:

The Supreme Court of Wisconsin erred in holding and deciding:

First: That the employment in which the said William H. Gray was engaged at the time of his injury under the evidence admitted and offered did not constitute *employment in commerce between the several states.*

Second: That the said William H. Gray, under the evidence admitted and offered, was not injured while employed in commerce between the several states.

Third: That in order to constitute "employment in commerce between the several states" an engine dispatcher must be employed exclusively in dispatching engines in interstate commerce; that an engine dispatcher whose duties require him to dispatch alternatively engines engaged in intrastate and interstate commerce, if injured while waiting for engines to be turned over to him to be dispatched,

is not then "employed in commerce between the several states," and such employe is not injured "while he is employed in commerce between the several states"; that the employment of an engine dispatcher in taking care of engines immediately after their return from interstate trips does not constitute "employment in commerce between the several states." (See Assignment of Errors, Transcript pp. 2 and 3.)

Fourth: That the Municipal Court did not err in rejecting and striking out the testimony of the witness Armstrong, which was in substance as follows:

"Mr. Armstrong re-called by the defendant.

"I am familiar with the character and kind of business done by the Chicago and North Western Railway Company on our division at Antigo. As I understand it, interstate traffic is the exchange of business between two states.

Q. At and prior to the plaintiff's accident was the North Western road, its trains, engines and employes engaged in hauling cars of freight continuously between Michigan and state of Wisconsin and points in Illinois and state of Wisconsin?

A. Yes, sir.

Moved to have the answer struck out. Motion granted.

Objected to because it does not appear what employes are meant, and further objection is immaterial, incompetent and irrelevant as to whether their engines, their employes and their trains and crews may have or might have been in any respect engaged in interstate traffic, and that the only thing material, if at all, would be the use made of this particular engine, that is the engine on which the plaintiff was hostler.

By the Court: Objection sustained. The only question is as to this engine as I can see it; the engine on which this person was engaged at the time.

By Attorney Martin: My objection goes to all of these questions. 1st. Because the witness is not competent. 2nd. Because the testimony is not admissible under the pleadings. 3rd. The testimony itself is incompetent, irrelevant and immaterial.

Engines that were being hostled at this roundhouse at the time in question were making trips from Antigo to Ashland, going through Michigan. At the same time engines and trains were making connection with the Watersmeet branch (elsewhere appearing to be in Michigan). Engines running south won't run out of the state, but in coming to and going from the south they handle refrigerator cars from Chicago. The dispatcher is under the jurisdiction of the

foreman of the roundhouse, and Mr. Gray was under the dispatcher's jurisdiction. The roundhouse is the place where all these engines that come in from runs there rest. They clean all the coal and cinders out and get wood and water and are put in there to stay until the next trip. Some repairs are done in the roundhouse too. The dispatcher takes the engine, after the train crew leaves it, near the roundhouse. The roundhouse, with the coal shed, sand house and cinder pit and the blow-off box and these other buildings are all crowded together. I know of no definition in the railroad service as to what constitutes employes, or who shall be employed on the road, and no standard is fixed so far as I can see as to where the division line is.

Exhibit "9" is a photograph taken at or near the north end of the cinder pit looking south in the city of Antigo.

The Plaintiff now moves to strike out all the testimony of this witness except his testimony identifying Exhibit "9", for the reason urged in our objection to the testimony when first offered, that is the testimony elicited from this witness since he was last called to the witness stand, and bearing generally upon the question of so-called interstate traffic.

The motion is granted as far as the testimony goes to the phase of interstate traffic.

Whereupon the defendant duly excepted.

The plaintiff moves to strike out the balance of the testimony, for the reason it is immaterial, incompetent and irrelevant, and now moves to strike it out.

The motion is granted.

Whereupon the defendant duly excepted."

(Transcript pp. 236 to 238.)

ARGUMENT.

But one question is presented by this record, and that is the following:

Was William H. Gray, under the Evidence Admitted, and the Evidence Excluded, Employed in Interstate Commerce?

Restating the material facts, they are as follows:

First: The Railway Company, at the time and place, was engaged in Interstate Commerce.

Second: The engines dispatched at the roundhouse at Antigo hauled trains to Ashland through Michigan and also to the Waters-

meet branch in Michigan; hauled trains bound to and from Chicago, some of which contained refrigerator cars and interstate freight; no proof that *all* engines at *all* times handled interstate freight.

Third: The duties of Gray and his assistants were to take engines coming in off the road, dump their cinders in the cinder pit, fill them with coal and water and kindling, and then house them in the roundhouse; *keep the cinders shoveled out of the cinder pit; keep the cinders wet down with water and free from fire so as not to destroy the rails and ties over the cinder pit and endanger the engines; to exercise authority and jurisdiction over the cinder pit man; to look after; watch, guard and protect the cinder pit.*

Fourth: On the morning in question the accumulation of hot cinders had endangered the cinder pit. Gray gave orders that they be wet down and cooled off; while waiting for another engine to arrive which he could dispatch *he went to the cinder pit to observe the condition thereof and see whether his orders were being carried out, and when returning therefrom to his shanty to wait for another engine to be dispatched he received the injury in question.*

The "employment" of Gray has two aspects:

First: He must clean, coal, water and house *both* state and interstate engines. From necessity each engine must be handled separately.

Second: He must maintain, watch over and keep in condition the cinder pit and the ties and rails thereover; he must keep the cinders shoveled out of the cinder pit, keep them wetted down and cooled, so the heat and fire will not destroy the rails and the steel ties. Otherwise, his engines while being cleaned, may fall into the pit.

We submit that his employment, in its second aspect, does not differ in any respect from the employment of the bridge repairer, or the section man, who is repairing or maintaining that part of the permanent system of the railroad which is devoted to intrastate and interstate commerce.

Within the rule of the Pederson case, 229 U. S., 146, Gray was employed, while performing these duties, in interstate commerce.

While the citation of this case should be deemed sufficient, yet we desire to call the court's attention to applications of the rule, and principle thereof, by other and inferior tribunals.

In *Barlow vs. Lehigh Railway Company*, 143 N. Y. Supp., 1053, where an employe was switching coal, which was to be used by both state and interstate engines indiscriminately, it was held that he was employed in interstate commerce.

So the unloading of oil intended to be used as fuel for state and interstate engines constitutes interstate employment.

Montgomery Southern Pacific Railway Company, 131 Pac., 507.

Where a pumper who pumped water, in tanks, from which state and interstate engines drew their water, was injured, while riding on his hand car to work, his employment was held to be interstate.

Horton vs. Oregon Navigation Company, 130 Pac., 897.

The wheeling of coal to be used for a repair shop where state and interstate engines were repaired constitutes interstate employment.

Cousins vs. Illinois Central Railway Company, 148 N. W., p. 58.

In the Merkl Case, 198 Fed., 1, (C. C. A.) the employe was engaged in repairing a refrigerator car which was indiscriminately used in both kinds of service, sometimes in one and sometimes in the other.

Held that he was employed in interstate commerce.

Also *Missouri K. & T. Ry. vs. Demahy Co.*, 165 S. W., 529;
Winters vs. Minneapolis & St. L. R. Co., 148 N. W., 106.

Thus it seems clear that if Gray had been injured *while standing at the cinder pit, and actually engaged in supervising the wetting down of the cinders*, there could be no question but that he was then employed in interstate commerce. It matters not, under the authorities as we read them, that at the moment of injury he was *walking to or from his place of employment*.

North Carolina Railway Company vs. Zachary, 232 U. S., 248.
St. Louis, San Francisco & T. Ry. Co. vs. Seale, 229 U. S., 156.

I. C. R. Co. vs. Nelson, 203 Fed., 951 (C. C. A.);
Lamphere Case, 196 Fed., 336;
Rentz Case, 162 S. W., 959;
San Pedro Railway Co. vs. Davide, 210 Fed., 870 (C. C. A.);
St. Louis & Southwestern Railway Company vs. Brothers, 165 S. W., 488;
Sanders vs. Charleston Railway Company, 81 S. E., 283.

I further submit that his employment, in its first aspect, constitutes interstate employment. At the moment of his injury he was returning to his rest shanty, where he would await the arrival of another engine. It was not shown, and then probably could not be known, whether such engine would be one hauling interstate freight or intrastate freight. He would not only handle that engine, but all others that would come after it later in the day. This was early in the day.

As stated by the Wisconsin Supreme Court in its opinion (Transcript p. 287), about thirty engines were dispatched each twenty-four hours. While going to such work, or waiting for it, his employment was as much interstate commerce as if it were definitely ascertained that the very next engine would be an interstate engine. It was his duty then to await and dispatch all of the engines then out on the road running towards Antigo, both state and interstate. It seems ridiculous to argue that the character of his employment during the period of waiting must be determined by the merest chance that the next arriving engine is either an intrastate or an interstate engine. It is likewise ridiculous to argue that the character of his employment is changed because of the fact that these engines arrived singly rather than in numbers, constituting a train.

We submit that the case is identical with the situation in *St. Louis, San Francisco & T. Ry. Co. vs. Seale*, 229 U. S., 156.

There a car checker was going through the yards to a place where he was to await the arrival of a train which would bring both state and interstate cars. It was his duty to examine the cars, make a record of the numbers and initials, and to inspect and make a record of the seals on the car doors. Of course, he had to handle each car separately. It might well have been argued in that case that because

he had to handle each car separately he was not, while approaching his work, engaged in interstate commerce.

This court, however, held, as stated in the syllabus:

"An employe, whose duty is to take numbers of and seal up and label cars, some of which are engaged in interstate and some in intrastate traffic is directly, and not indirectly, engaged in interstate commerce."

I submit that the mere fact that these mixed cars arrived in a single train is wholly immaterial. Thus we conclude that in both of its aspects Gray's employment was interstate.

It may be profitable to discuss the opinion of the State Supreme Court. That case was argued April 30th and decided May 31st, 1913. Both the Pederson and the Seale cases, *supra*, were decided May 26, 1913, only five days before the decision in this case, and these decisions were not then published or known.

At that time the law was in a state of great uncertainty. But little had been said by this court on the question as to what constituted interstate employment. The State Courts were groping around trying to find the light. Just previous to the decision in this case the Wisconsin Supreme Court had decided the case of *Ruck vs. C. M. & St. Paul Railway Company*, 153 Wis., 158, wherein it held that a mechanic, who was injured while engaged in repairing a wrecker outfit, which outfit at times was used in both intrastate and interstate commerce, was not employed in interstate commerce.

The case did not go on the proposition that the wrecker outfit was alternately used for both kinds of commerce, but went on the point that work in making repairs on mere appliances or premises was too remote from the actual moving of interstate commerce to constitute employment therein. From the cases above cited it now seems obvious that this was an erroneous deduction.

In addition to the cases already cited see the following cases on the question of repairing appliances and premises used in interstate commerce.

Gaines vs. Detroit Railway Company, 148 N. W., 397.

Freeman, Receiver vs. Powell, 144 S. W., 1033.

Zachary Case, 232 U. S., 248.

Eng vs. Southern Pacific, 210 Fed., 92.

Armbruster Case, 147 N. W., 338.

In the latter case it is held that the coaling of an engine to go out on an interstate trip constitutes interstate employment.

Most, if not all of these cases, draw their inspiration and application from the Pederson and Seale cases, and it is now clearly apparent that the Ruck case was wrongfully decided by the Wisconsin Supreme Court.

In *Graber vs. Duluth, South Shore & Atlantic Ry.*, 150 N. W., p. 489, decided Jan. 12, 1915, the Wisconsin Supreme Court cited the *Pederson, Zachary and Behrens* (233 U. S., 473) Cases.

There a brakeman arrived at the terminal on an interstate train, finished up his train work, went from the Railroad Company premises to get a drink of liquor, and was injured while crossing the railroad yards to go to the depot to meet his conductor and ascertain if there were any further orders, and the court held that at the time of the injury he was engaged in interstate commerce. This case should be read to understand the new view of the law taken by the Wisconsin Supreme Court.

Starting with the false premises adopted by it in the Ruck case, the Wisconsin Supreme Court makes its first proposition (Transcript p. 291), to-wit:

"Taking care of an engine after it has completed its run, and preparing it for the roundhouse, seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply preparing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce."

The Court then proceeds to its next premise, which we see from the above authorities is likewise false. This is, that one, while awaiting the arrival of other engines which may be state or interstate, cannot be said to be "employed in interstate commerce" during the hours of his *leisure*.

The court concludes as follows:

"The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish the fact that the plaintiff's *entire work* consisted of dispatching engines engaged in interstate commerce."

(Transcript, p. 291.)

It should be specially noted that the Wisconsin Supreme Court did not fully state the facts in relation to, or discuss, what we have herein called the "second aspect" of Gray's employment. It probably considered this immaterial because of the view of the first premise, to-wit, the dispatching of an engine was like repairing it and, therefore, the maintenance and repairs of the cinder pit and track there-over were of the same character.

In Colasurdo vs. Central Railway Company, 180 Fed., 832; affirmed, 192 Fed., 901 (C. C. A.), followed and approved in *Horton vs. Oregon Navigation Company*, 130 Pac., 897, the Court, in referring to the Federal Employers' Liability Act, and the construction placed thereon by this court, well said:

"The Act meant to include everybody whom Congress could include."

It seems to us that this is the true test. The question then is, can it be held, by any reasonable construction, that Gray's employment was interstate. It is almost a matter of common knowledge that on the main lines of the great interstate railroads, like the Chicago and North Western Railroad, the great bulk of the business is interstate. The Products of the forest, the factory and the farm must be carried into the great interstate markets. The return trips of the cars must bring in the manufactured products of the great industrial centers, the meats, the oils, clothing, boots and shoes, coffees, teas and refrigerated foods. It was Gray's duty to handle every engine (during his portion of the day) that hauled all this great bulk of commerce. He must maintain his appliances, his bars and picks and rods, his cinder pit, his track and premises so as to carry on this work. The employment is single and entire. When he is going to the premises in the morning and returning at night he is approaching and returning from one employment, not two. It is unreasonable to say or to hold that because by chance some engine may haul a passenger train on which there is no interstate passenger, or a freight train on which there is no interstate shipment, therefore, while waiting between the arrival of trains he is not engaged in interstate commerce. *Reducing the argument to an absurdity, it must likewise follow that while waiting he is not employed in intrastate commerce.*

Therefore, we submit that in both of its aspects Gray's employment was interstate, and the Wisconsin Supreme Court erred in its holding to the contrary.

EDWARD M. SMART,

*Solicitor and Counsel for Plaintiff in Error,
Chicago and North Western Railway Company.*

Service of the foregoing brief is hereby accepted and delivery of a copy thereof is hereby acknowledged this.....day of March, A. D. 1915.

.....
Attorney for Plaintiff in Error.

.....
Attorney for Defendant in Error.

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In Supreme Court of the United States

OCTOBER TERM, 1914.

No. 232.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM H. GRAY,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

I.

Is this Court without jurisdiction because the writ of error is signed "F. W. Oakley, Clerk of the District Court of the United States for the Western District of Wisconsin, by Fred W. French, Deputy."

The learned counsel for the defendant in error makes the point that this court has not acquired jurisdiction because a writ of error must be signed by the clerk personally, and cannot be signed by his deputy in his behalf.

Section 623 *United States Compiled Statutes* provides for the appointment, in the Western District of Wisconsin, of a clerk of the Circuit and District Courts. Section 624 of said statutes provides that one or more deputies of any clerk of a Circuit Court may be appointed by such court on the application of the clerk, etc.

No limitation is placed by said sections upon the powers and duties of such a deputy, nor are they in any manner specified.

In the absence of any statutory provision or implication to the

contrary a deputy clerk is authorized to perform any official ministerial act that may be done by his principal.

Cyc. Vol 7, page 248.

The fact that a warrant, citation and monition in the District Court was not signed by the clerk of the court was held unimportant, it having been attested by the judge, sealed with the seal of the court and signed by the deputy clerk. The court said, "an act of Congress authorized the employment of the deputy and in general a deputy of a ministerial officer can do any act which his principal might do."

The Confiscation Cases, 87 U. S. 92, 111.

In *Garneau vs. Dozier*, 100 U. S. 7, the court held that a transcript of the record was sufficiently authenticated for the purposes of a writ of error where it was signed by the deputy in the name and for the clerk of the court to which the writ of error was directed.

In *Bryan vs. Ker*, 222 U. S. 107, 113, in which process for the detention of a vessel bore the purported signature of the deputy clerk, which was not in fact his own but was affixed by his brother under an attempted but ineffectual delegation of authority, but the writ was in the usual form, was issued from the office of the clerk and bore the seal of the court as evidence of its authenticity, the court held that this irregularity did not render the writ void but merely voidable, for it could have been amended by substituting the true for the purported signature of the deputy.

Section 1004 United States Compiled Statutes provides that writs of error returnable to the Supreme Court may be issued as well by the Clerks of the Circuit and District Courts under the seals thereof as by the Clerk of the Supreme Court.

Section 1005 of said statutes provides that the Supreme Court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of a writ of error when there is a mistake in the *teste* of the writ or a seal to the writ is wanting, or when the writ is made returnable on a day other than a day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to

the accompanying record, and in all other particulars of form, provided the defect has not prejudiced, and the amendment will not injure, the defendant in error.

Where a writ of error was signed by the clerk of the Court of Criminal Appeals of Texas, instead of by the clerk of the Supreme Court of the United States, or of the Circuit Court of the United States for the proper district, such error was held amendable under *Section 1005*, which provides that the Supreme Court may allow an amendment of a writ of error in all particulars of form.

Miller vs. Texas, 153 U. S., 535.

Even where the writ of error bore the *teste* of the Chief Justice of the Supreme Court of Texas, was signed by the Chief Justice and the Clerk and sealed with the seal of that court, it was held that all such defects came within the remedial provisions of the statute and that the seal and signature of the clerk of the Supreme Court of the United States might be affixed to the writ.

Texas & Pacific R. R. Co. vs. Kirk, 111 U. S. 486.

It would also appear that the entry of a general appearance would cure a defective writ of error.

McDonogh vs. Millaudon, 44 U. S. 693, 707.

In the above case the defect complained of was that the clerk of the State Court issued the writ and the court said:

"If errors had been assigned by the plaintiff here, and joined by the defendant, no motion to dismiss for such a cause could be heard; and as no formal errors are usually assigned in this court, and none were assigned in this cause, we think the delay to make the motion is equal to a joinder in error, even if the clerk of the Supreme Court of Louisiana had no authority to issue the writ."

Section 1005 of the Compiled Statutes of the United States referred to above was passed June 1st, 1872, and the cases of *Hodge vs. Williams*, 22 How. 87, and *Carroll vs. Dorsey*, 20 How. 204, wherein the Supreme Court discussed the power to amend the writ of error, were decided prior to the adoption of said section.

It seems reasonably clear from the foregoing that the writ was properly signed, but if not, and the defendant in error is now in

position to raise any objection on that account, the Supreme Court instead of dismissing the writ would merely authorize its own clerk to sign and seal such writ.

II.

Defective Assignments and Specifications of Error.

The learned counsel for the defendant in error urges this court to affirm the judgment, on the ground that our assignments and specifications of error do not comply with the statute and rules of this court. He claims that the questions involved are raised by alleged error in the "rejection of testimony," and that we have failed both in the Assignment of Errors and in the Specification of Errors, to set forth "the full substance of the evidence rejected."

As to our failure to comply with this rule as to Specification of Error in the brief, we beg to call the court's attention to the fact that immediately upon this point being called to our notice we reprinted our briefs, and have served and filed the same with this court as an "Amended Brief of Plaintiff in Error". This brief was served March 1, 1915, and we expect that it will have been timely served within the rules. In such amended brief, and by the "fourth" specification of error found on pages 11 and 12, it will appear that we now have complied with the rules of this court so far as such rules apply to briefs.

As to the Assignment of Errors filed with our petition for the Writ of Error, we have served notice of a motion for leave to amend such assignment of errors, and added an additional assignment in the same language as was set forth in our fourth Specification of Error.

This motion has been set for hearing before this court on the 22d day of March, 1915, or in case the cause shall be called for argument prior thereto, then at the time this cause is called for argument. In such motion papers we have set up the facts and shown the reasons and causes for the failure to incorporate this Assignment of Errors in the original Assignment of Errors. We refer to said motion papers, and respectfully submit to this court that the amendment should be allowed. It would seem clear that it is within the power and discretion of the court to allow an amendment of an

Assignment of Errors under the circumstances, where no injustice will be done to the defendant in error, and where, if the amendment were not allowed, substantial injustice would be done to the plaintiff in error.

2 Encyclopedia Pleading and Practice, 920.

Ackley vs. Hall, 106 U. S., 428.

Bunyan vs. Loftus, 57 N. W., 685.

Hall vs. Railway, 84 Ia., 311.

Hubbard vs. Garner, 73 N. W., 390.

We call the court's attention to the fact that, notwithstanding the learned counsel for the defendant in error has suggested this point, yet it fully appears from his brief, and also from our briefs, that the questions have been fully argued and discussed, and the testimony rejected has now been set forth before this court in compliance with the rule.

As we understand it, the object of the rule with reference to Specification of Errors in *briefs* is to properly inform this court and opposing counsel as to the exact question raised and the error alleged. This has been accomplished by the amended brief. It seems to us that the main object of the Assignment of Errors is to submit and present to the judge allowing the Writ of Error a statement showing errors claimed, and thereby enabling him to determine whether the Writ of Error shall be allowed. Completeness and adequacy of Assignment of Errors are necessarily important in cases where the petition is presented to a judge of the reviewing court, because such judge has no knowledge of the proceedings in the lower court, excepting as he may gain the same from an inspection of the record, and it is not contemplated that he shall be required to make such inspection, but the Assignment of Errors shall furnish such information.

In the present instance the Writ of Error was allowed by the Honorable John B. Winslow, Chief Justice of the Supreme Court of the State of Wisconsin. (Transcript of Record p. 3.) Mr. Justice Winslow was the Justice who wrote the opinion of the Supreme Court of the State of Wisconsin, and was necessarily entirely familiar with the questions involved, as they are fully discussed in his opinion. (Transcript pages 289 to 293.)

For these reasons, and because of the excuses given for failure

to make proper assignment originally, (all as set forth in the motion to amend) we submit that in the proper exercise of discretion this court should permit such amendment.

Even if there has been no proper Assignment of Errors, and this court is without power to permit such amendment, we submit this is a case where the court should, at its option, notice a "plain error" not assigned according to Rule 21, Subdivision 4 of the rules of this court.

That this court will follow this course in a proper case is amply indicated by its decisions.

Columbia Heights Railway Company vs. Rudolph, 217 U. S. 547, and Citations.

A court should notice an unassigned error where it is "controlling."

C. R. I. & P. Ry. Co. vs. Barrett, 190 Fed., 118.

Where the question raised by the unassigned error lies at the threshold of the case, and is involved in errors already assigned, then the court should, in the exercise of proper discretion, consider the unassigned error.

United States vs. Bernays, 158 Fed., 792.

Even though an Assignment of Error is not sufficient under the rules, yet where it underlies other questions assigned, then the court should notice such error.

Andrews vs. National Foundry Co., 77 Fed., 774.

Non-compliance as to Assignment of Errors will be disregarded where the merits are fully considered by the Court below and discussed by the briefs in the reviewing court.

Flagler vs. Kidd, 78 Fed., 341.

Where there is no motion to affirm because of no Assignment of Error, and before the hearing in the reviewing court appellant

amends his brief, supplying proper Specification of Error, the court will not affirm.

Nivens vs. Nivens, 4 Indian Territory, 30.

Roberts vs. Parker, 90 N. W., 744.

In the case at bar the question raised on the ruling as to rejection of the evidence is controlling, and underlies all other questions within the rules of the decisions above stated. While it is true that the question arises in the form of a ruling on the striking out of evidence, yet it will appear from the opinion of the Supreme Court that the court took into consideration the evidence stricken out as well as the evidence admitted, and decided on the whole of such evidence, and determined thereon the issue and question here raised. The Assignment of Errors which we did make (Transcript pages 2 and 3) fully sets forth the question really raised, and the additional assignment which it is claimed we should have made, and which we have sought to add by an amendment, is merely an elaboration, and the setting forth of the same in compliance with the rule.

We respectfully submit that in a case of this kind, where the failure to assign errors has arisen because of inadvertence and inexperience, and it conclusively appears that no prejudice has resulted, it would not be in full accord with the spirit of the times, which calls for the waiving aside of technicalities in order to do substantial justice.

III.

Federal Question.

The learned counsel for ^{defendant}~~plaintiff~~ in error argues that there is no Federal question involved and, therefore, this court has no jurisdiction, and the judgment should be affirmed.

As we understand his argument, it proceeds thus:

(a) The negligence charged against the defendant is that of fellow servant.

(b) The defendant is liable for the negligence of a fellow servant equally under the State and Federal law.

(c) The only substantial difference between the two laws is that under the *State* law contributory negligence may be a defense, while under the *Federal* law it only goes in diminution of damages.

(d) The jury found the plaintiff was *not guilty of contributory negligence*.

(e) Because the jury found there was no contributory negligence, the Wisconsin Supreme Court *might* have based its decision on the point that it was *immaterial* under which law the case was tried, and, therefore, any error in failure to try the case under the Federal law was harmless and unprejudicial.

(f) Thus, there being two grounds upon which the Supreme Court of Wisconsin *might* have decided the case, to-wit, one under the general law and one involving a Federal question, this court is thereby precluded from reviewing the decision on the Federal question. (Brief of Defendant in Error, pages 17 to 29.)

Restated, the point is that even though the Supreme Court of Wisconsin passed on and decided the Federal question, yet it *might* have held that the error of the trial court was harmless and non-prejudicial. Therefore, this court should refuse to decide the Federal question, and should affirm the judgment.

We recognize that it is established by a long line of authorities in this court that if the decision of a state court is *actually* based on two questions, one the Federal question, and one the non-Federal question, this court will not review the federal question.

(See cases cited in Brief of Defendant in Error, page 26.)

Here the situation is different. The state court did *not* hold or decide that any error committed by the trial court was harmless, but *assumed* that any such error (if there was such) would have been *harmful*, and therefore passed to and decided the Federal question.

In *St. Louis & Iron Mountain Railway Co. vs. McWhirter*, 229 U. S., 265, the complaint presented two distinct causes of action, one at common law and the other under the Federal Employers' Liability Act, involving the hours of service law. The state court permitted the case to go to the jury, on the theory that the defendant was negligent because the plaintiff was employed longer than was lawful under the hours of service law.

In this court it was sought to sustain the judgment, on the ground that there was another common law ground of negligence, to-wit, the negligence of the engineer. This court reversed the judgment, and disposed of this question in the following language:

"If, as is inferable from the argument, reliance is placed on the ruling of the court below that there was evidence tending to show negligence on the part of the engineer for the purpose of establishing that even if a Federal question was passed upon the case was also decided on an independent non-Federal ground broad enough to sustain the judgment, the proposition is without merit. The mere ruling that there was evidence sufficient to authorize consideration of the case from the point of view of negligence alone, affords no basis for saying that the case was decided on such ground. Mere conjecture may not be indulged in for the purpose of concluding that because there was a *potentiality* of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect. But it was long since pointed out in *Neilson vs. Lagow*, 12 How. 98, the court speaking through Mr. Justice Curtis, that to admit that the authority to review the action of a state court where it has decided a Federal question can be rendered unavailing by a suggestion that the court below *may* have rested its judgment on a non-Federal ground, would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion."

In *Henderson Bridge Company vs. Henderson City*, 173 U. S., 592 two questions were put up to the state court, to-wit:

- (a) The common law question of *res adjudicata*; and
- (b) The Federal question.

The State Appellate Court expressly waived and passed by the question of *res adjudicata*, and decided the Federal question.

On Error to this court it was sought to sustain the judgment of the State court, on the ground that the state court *might* have based its decision on the question of *res judicata* and, therefore, there was no Federal question involved.

This court disposed of this question in the following language:

"If the state court had sustained the city's plea of *res judicata* upon some ground that did not necessarily involve the determination of a Federal right, it might be that the present case would come

within the rule, often acted upon, that this court in reviewing the final judgment of the highest court of a State will not pass upon a Federal question, however distinctly presented by the pleadings, if the judgment of the state court was based upon some ground of local or general law manifestly broad enough in itself to sustain the decision independently of any view that might be taken of such Federal question. But that rule cannot be applied to the judgment below. Upon examining the opinion of the Court of Appeals of Kentucky in this case we find that that court expressly *waived* any decision upon the plea of *res judicata* for the reason that some views were then pressed upon its attention that had not been presented in previous cases, and it reconsidered and discussed the main question suggested by the defence, namely, that the Constitution of the United States forbade the assessment of that part of the bridge property between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio River. This court therefore has jurisdiction to review the final judgment of the state court for the purpose of ascertaining whether it deprived the defendants of any right, privilege or immunity specially set up by them under that instrument."

At this point we wish to call the court's special attention to the Henderson Bridge case, as it seems almost parallel to the case at bar. In the case at bar the Wisconsin Supreme Court *might* have held that because the jury found the plaintiff not guilty of contributory negligence it was immaterial under which law the case was tried and, therefore, refused to have passed on the Federal question. However, in the Henderson case, the court *waived* (impliedly) the first question and passed to and decided the Federal question. Perhaps we are admitting too much when we say that the Wisconsin Court waived the first question. We think the better reasoning leads to the conclusion that the Wisconsin Supreme Court *impliedly held that if there was any error it would be prejudicial.*

Counsel cite and quote from the case of *Kennebec Railroad Company vs. Portland Railroad Company*, 14 Wallace, page 23, as holding that there is no Federal question where the decree of the state court *could* rest on a non-Federal question. The Federal question involved was as to whether or not the statute of 1857 impaired the obligation of a contract.

This court says:

"But a full examination of the opinion shows that if judgment was based upon the ground that the foreclosure was valid, *without reference to the statute of 1857*, of course the method pursued was in strict conformity to the mode of foreclosure authorized when the contract was made by the laws then in existence."

If counsel had read this opinion carefully, he would have discovered that this case is in line with the general rule.

We submit that where the state court *waives a possible non-Federal question*, or *impliedly decides* against the defendant in error on the non-Federal question, and passes to and decides the Federal question, this court has jurisdiction to review the Federal question, and, if erroneously decided, should reverse the state court.

IV.

Harmless Error.

Is it harmless error to try a case under the State Law when the sole liability is under the Federal Law?

Fearful that this court may hold that, under the evidence received and rejected, Gray was employed in interstate commerce, counsel spends a great deal of time in an effort to demonstrate to this court that any error of the state court in holding to the contrary was harmless and immaterial. We now address ourselves to this proposition.

We will now assume that this court will hold that the state court committed error. We are first concerned in determining what the *presumptions* are as to whether error is harmful, and also what the chances are that the error *may in fact* have been harmful.

In 2 *Encyclopedia of United States Supreme Court Reports*, page 347, we find the following rule:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it is committed, it is well settled that a reversal will be directed unless it appears, *beyond doubt* that the error complained of did not

and *could not* have prejudiced the rights of the party. In other words, error is *presumed to be prejudicial* unless the contrary is shown, and errors cannot be said to be immaterial where it does not appear, *beyond doubt*, that they were errors which *could not* prejudice the rights of the plaintiff."

In *Boston & Albany Railroad Company vs. O'Reilly*, 158 U. S., 334, this court used the following language, to-wit: .

"* * * While an Appellate Court will not disturb a judgment for an immaterial error, yet it should appear *beyond a doubt* that the error complained of did not and *could not* have prejudiced the rights of the party duly objecting."

In *Mexia vs. Oliver*, 148 U. S., 664, page 673, it is said:

"We cannot say that these errors were immaterial, as it does not appear *beyond doubt* that they were errors which *could not* prejudice the rights of the plaintiff."

In a case as late as *Crawford vs. United States*, 212 U. S., 183, the court said on page 203:

"There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is *clearly shown* from the record that the commission of such an error against a party seeking to review it, is no cause for a reversal of the judgment."

See also particularly the case of

Wilmington vs. Fulton, 205 U. S., 60.

The parent cases upon which this rule is founded are:

Deery vs. Cray, 5 Wallace, 795, 807.

Smith vs. Shoemaker, 17 Wallace, 630.

In the Deery case the following language is used:

"* * * It must appear *so clear as to be beyond doubt* that the error did not and *could not* have prejudiced the party's rights."

In addition to the presumption that the error was prejudicial, we have a further presumption that both the trial court and the Wis-

consin Supreme Court have *held that it was prejudicial*. It is a familiar rule in all appellate courts that the reviewing tribunal will not decide unnecessary questions. It must be presumed that the Wisconsin Supreme Court considered two questions, to-wit:

- (a) Was error committed?
- (b) Was it prejudicial?

If the court could have said, as counsel now contend, that the error was harmless it would have, undoubtedly, taken that as the principal ground of decision. Because it passed by in silence any such possible ground of decision, and proceeded to consider the merits of the proposition, we must here conclude that the Wisconsin Supreme Court was itself of the opinion that an error of this kind was harmful. This being the *presumption* in the case, we submit that this court should not overrule the implied holding of the Wisconsin Supreme Court in this respect. Defendant in error has taken no cross-appeal, and is in no position now to contend that any holding of the Wisconsin Supreme Court to the effect that the error was prejudicial, is erroneous.

Therefore, we conclude, at the outset of the consideration of this question, that two things are true, to-wit:

- (a) The error is presumed to be harmful;
- (b) The Wisconsin Supreme Court impliedly held that it was harmful.

Assuming that we are wrong on the two foregoing contentions, there remains to be considered the question as to whether or not, on looking into this record, this court can say that it appears "*beyond a doubt*" that the error complained of did not and *could not* have prejudiced the rights of the party duly objecting."

Counsel for defendant in error has added an appendix to his brief, containing both the Federal Employers' Liability Act and the Wisconsin Railway Employers' Liability Act.

(See Brief 74-80.)

The copies of brief served on us show that these two acts have been intermingled in alternate pages so that there is some confusion.

Because thereof we have reprinted the Wisconsin Act as an appendix to this brief.

The following points involved in this law should be noted:

(1) The opening paragraph creates liability "subject to the provisions hereinafter contained regarding contributory negligence";

(2) Sub-paragraph 2 makes the company liable for negligence of a fellow servant, where the injury is caused "*in whole or in greater part* by the negligence of any other officer, agent, servant or employe;"

(3) Sub-paragraph 3 makes it *mandatory* to submit the issues to the jury by a *special verdict*;

(4) Sub-paragraph 4 provides that where the negligence of a fellow servant "was greater than the negligence of the employe so injured, and *contributed in a greater degree* to such injury" then the plaintiff may recover, and contributory negligence will be no bar.

(5) Sub-paragraph 5 provides that all questions of negligence and contributory negligence *shall be for the jury*.

(6) There is no provision whereby contributory negligence diminishes the damages.

(7) There is no provision (like Section 4 in the Federal Employers' Liability Act) recognizing that assumption of risk shall be a defense, except where there is a violation of the statute for the safety of employees.

(8) There is no provision (like Section 5 of the Federal Employers' Liability Act) whereby any sum paid by the carrier to any insurance, relief benefit or indemnity, may be set off against any damages on account of the injury.

We desire to point out the various things which could be prejudicial to the plaintiff in error where a trial was had under the State Act instead of under the Federal Act, to-wit:

First: SPECIAL VERDICT:

Under sub-section 3 of the Wisconsin Act aforesaid it is *mandatory* upon the court to submit a special verdict. If this case were

tried under the Federal Act, the court would follow the statute which applied in ordinary cases.

Section 2858 of the Wisconsin Statutes of 1911 reads as follows:

"The court, in its discretion, may, and when either party, before the introduction of any testimony in his behalf, shall so request, the court shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of questions, in writing, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular questions of fact, to be stated as aforesaid. In every action for the recovery of money only or specific real property the jury may, in their discretion, when not otherwise directed by the court, render a general or a special verdict."

It appears from this statute that in cases not coming under the Wisconsin Railway Law a special verdict is only mandatory where one party requests it before the introduction of any testimony. Thus we see that in the case at bar a special verdict was *compulsory*, whereas if it had been tried under the Federal Act it was not compulsory unless requested by either party.

Second: WISCONSIN RULE AS TO ORDINARY CARE:

Being tried under the State law the Wisconsin Court, of course, followed its own definition of "ordinary care". If it had tried the case under the Federal law it would be the duty of the court to have adopted the rule of the definition of "ordinary care", as it has been defined by the Federal Courts.

In the Nitro-Glycerine case, 15 Wallace, 524, it is said in the syllabus:

"The measure of care against accidents which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use *if his own interests were to be affected, and the whole risk were his own.*"

In *Hennessey vs. C. & N. W. Ry. Co.*, 99 Wis., 109, page 118, it is held:

"The definition of ordinary care as 'such care as the ordinary

person uses in the transaction of the *ordinary affairs of life* is certainly inaccurate, if not positively erroneous."

Third: PROXIMATE CAUSE:

In Wisconsin it has been repeatedly held that it is error unless the trial court defines "proximate cause" in substantially the following language:

"The efficient cause, that which acts first and produces the injury as a natural and probable result, under such circumstances that he who is responsible for such cause, as a person of ordinary intelligence and prudence, ought reasonably to foresee that a personal injury to another may probably follow from such person's conduct. It is not necessarily the immediate, near, or nearest cause, but the one that acts first, whether immediate to the injury or such injury be reached by setting other causes in motion, each in order being started naturally by the one that precedes it, and altogether constituting a complete chain or succession of events, so united to each other by a close causal connection as to form a natural whole, reaching from the first or producing cause to the final result."

Deisenrieter vs. The Kraus-Merkel Maltng Co., 97 Wis., 279, 288.

This definition was adopted by the trial court. (Trans. of Rec. page 258.)

Many courts have refused to follow the Wisconsin Court in this definition. As to whether the Federal courts would or should adopt this definition we are unable to say.

Fourth: ASSUMPTION OF RISK:

In *Seaboard Air Line Co.*, 233 U. S., 492, this court points out and analyzes the clear distinction between "contributory negligence" and "assumption of risk".

In Wisconsin it is held as follows:

"This court has held that assumption of risk is a form of *contributory negligence*; hence a negative answer to the general question covering contributory negligence logically *includes also assumption of risk*, in the absence of a special question as to that special phase of contributory negligence."

Johnson vs. Coal Company, 126 Wis., 492, page 501.


In *Koepeke vs. Wisconsin B. & I. Co.*, 116 Wis., 92, page 95, it is said:

"By a long line of cases it has become settled here that so-called assumption of risk is but a phase of contributory negligence."

In *Seaboard Air Line Company vs. Horton*, *supra*, this court held assumption of risk was a complete defense under the Federal Employers' Liability Act.

At the time the case at bar was tried it was not believed, and it had not been held by the Wisconsin Supreme Court, that assumption of risk was a defense under the Wisconsin Railway Act. The lawyers in Wisconsin had in mind the decisions of the court holding that assumption of risk was but a form of contributory negligence and, therefore, it was believed by the railroad lawyers that the Wisconsin Railway Act did not permit it being distinguished from the contributory negligence referred to in the law. As we have noted above, the Wisconsin Act did not impliedly recognize that assumption of risk was a defense, (except where there was a violation of a law for the safety of employes), as is done in Section 4 of the Federal Employers' Liability Act. Notwithstanding it was believed that assumption of risk was not a defense under the Wisconsin law, yet counsel for the Railway Company, out of an abundance of caution, requested two questions in the special verdict which presented this issue. (See questions 11 and 12, Trans. of Record, page 269.) These were marked "refused except as given" (Transcript page 269), and by examination of the special verdict (Transcript pages 269 and 270) we note that this issue was not submitted.

If the case had been tried under the Federal Act, then under the rule of the Seaboard Air Line case this issue should have been submitted to the jury. Counsel is evidently fearful that the question of assumption of risk should have been submitted to the jury, because on pages 21 and 22 he argues that there was no evidence to sustain a finding of assumption of risk, and cites the case of *Y. & M. V. Ry. Co. vs. Wright*, 35 Supreme Court Reporter, 130, (decided Jan. 15, 1915) as holding that it would appear as a matter of law that there was no assumption of risk.



This case is without application. The facts are entirely distinguishable from the case at bar. We presume that it is out of place to attempt to demonstrate to a conclusion that Gray was guilty of assumption of risk as a matter of law. We desire, however, for the purpose of showing that the railway company *may* have been prejudiced to call attention briefly to the plaintiff's own testimony. The jury found that the Railroad Company was negligent, because Kane, the engineer (a) ran the engine north of the cinder pit; (b) Because Kane failed to ring the bell. Ordinarily one servant does not assume the risk of the negligent acts of another servant. We submit, however, that where an employe knowingly and voluntarily submits himself to the risk of being injured by a careless servant, whose common course of conduct is familiar to him, he thereby assumes the risk of being injured by his careless acts.

On the question of assumption of risk, we desire to call the court's attention to the following pages of the transcript of the record, to-wit: 113, 139, 148. From this record it appears that Gray walked seventy feet through the smoke and steam in a space alongside of the track within striking distance of an engine, knowing that engineers *commonly* ran their engines north of the cinder pit *without any signals*. On page 148 of the transcript he says that it was "a common occurrence for an engine to move along in there without giving the proper signals." He thought an engine might come there at that time, and that is why he stopped and listened. (Transcript page 113.) The finding of the jury that he was not guilty of contributory negligence does not dispose of the question. That simply means that in walking in this place in the steam and smoke, and in stopping and listening, he exercised the care of an ordinary person; it does not mean, however, that he did not know and appreciate and understand the risk of engine men running in this improper place at any time without signals.

For these reasons we submit that it was at least *for the jury* to determine the question of assumption of risk; that if the case had been tried under the Federal Act this would have been a defense, and we would have had a right to have it submitted, independent of the question of contributory negligence, *which was refused us on the trial*.

Fifth: CONTRIBUTORY NEGLIGENCE:

Counsel lays great stress on the point that because the jury found the defendant not guilty of contributory negligence, therefore, the railroad company is not harmed by the case being tried under the wrong statute.

We submit that this conclusion does not follow at all. The following are very good reasons therefor, to-wit:

(a) If the case had been tried under the Federal law it would have been the duty of the court to have expressly told the jury that if they found Gray guilty of contributory negligence then they should apportion the damage according to the negligence of the respective parties, and it would have told them that contributory negligence did not operate as a complete defense.

(b) In a trial under the state law ^{such} no instruction is given to the jury. The jury is *presumed to know* that contributory negligence is a complete defense if it is less than the negligence of the defendant. Not only is there this presumption, but as a matter of common practice attorneys in arguments give the juries to understand completely that a finding of contributory negligence may defeat the plaintiff. As there is nothing in this record to indicate the fact, we are not at liberty to state to the court as to whether or not one of the counsel for Mr. Gray directly told the jury what would be the effect of contributory negligence. Yet, we request counsel to frankly state to the court what the fact is.

Under the state practice the Wisconsin Supreme Court, in the case of Guse P. & M. M. Co., 151 Wis., 400, has held that it is not improper for counsel to state directly to the jury how they should answer respective questions. Can it be said, as a matter of law, that under these circumstances the jury would have found freedom from contributory negligence "beyond a doubt" if the case had been tried under the Federal law? It may be correct to *theorize* that the same jury, on the same facts, would have made the same finding, *regardless of the effect of their answers*. Theory does not conform to practice. To those attorneys who are trying cases under the Federal law, who have formerly tried them under the state law, it

is a matter of *common knowledge* that juries are much more free in finding contributory negligence where they understand that it merely *diminishes the damages*. Under the state law, and under the common law, the *natural sympathy* of the jury tends to pervert their judgment in deciding the question of contributory negligence, and *they are not to be blamed*. By their verdicts, in striking out contributory negligence as a *complete defense*, they have anticipated the legislatures in the states and also the National Congress in wiping out contributory negligence as a complete defense. They have done it by *masterful findings* of the facts. Now, however, as contributory negligence has by law been put in its proper place, so that it merely diminishes damages, the juries do and will decide the question with a more fair and even temper and disposition.

Therefore, we say that it is not right to conclude that a jury, passing on the question of contributory negligence, would, *beyond any doubt* make the same finding in a trial under the Federal act. I respectfully submit that if any member of this court would read Mr. Gray's own story in this case he would be satisfied that Gray convicts himself of contributory negligence. We have not in our own minds the slightest *doubt* that if this case can be tried under the Federal law, and a jury told that contributory negligence will merely diminish the damages, we may get a finding of contributory negligence. When we consider that the main part of the damages in this case is due to pulmonary tuberculosis developing a year after the accident, and resulting entirely *from the weakened condition predisposing to infection*, it is highly probable that the jury would have made a substantial apportionment of damages attributable to Gray's own negligence. The opinion of the Wisconsin Supreme Court shows that the weakness of this claim is only saved from annihilation because of the testimony of Gray's physician, to the effect that *in his opinion* the tubercular condition was a result of the injury. (Transcript page 292.)

In conclusion, under this part of the brief, we submit that it is impossible for this court to say that if the case had been tried under the Federal Act it still appears *beyond any doubt* that the result *could not* have been different.

Corrections and Comments.

First: On page 6 of Counsel's Brief it is stated that the testimony subsequently stricken out was received by the court "subject to objection". This is an error, as is demonstrated by reading the complete record on pages 678 and 679 of the same brief.

Second: On page 39 of Counsel's Brief it is stated "there is not a scintilla of evidence that Gray had hostled *an interstate engine* on that morning previous to his injury, or at any other time." This is an error. There were four engines dispatched on the morning before the accident. One was a local train starting from Rhineland, two were switch engines and the fourth *was an engine which came from Ashland*. (Transcript page 59.) The engines coming from Ashland pass through Michigan. (Transcript 233, 237.) Thus it conclusively appears that *one* of the engines dispatched on the morning in question by Mr. Gray was an interstate engine. Besides that, it is a matter of common knowledge that *switch engines*, (of which two were dispatched on the morning in question) are constantly engaged in switching and moving interstate freight. This may be taken judicial notice of by the court on the same theory upon which the Wisconsin Supreme Court judicially noticed the fact that great railroad systems like the Chicago and North Western Railway Company are continually engaged in both kinds of commerce. (Transcript page 291.)

Third: On pages 39 and 40 in counsel's brief it is stated that there is no positive evidence in the record that any interstate engines had been taken care of on this cinderpit. The evidence referred to under the last point shows this as an error.

Fourth: On page 42 of Counsel's Brief it is argued that even the attorney for the railway company did not believe there was sufficient basis of fact to claim the application of the Federal Act, because it was not plead in the answer. The answer in this case was drawn, and the case was tried by the writer of this brief. The answer was served April 10, 1912. The case was tried in July, 1912. The company attorney entered railroad business only on the 1st day of January, 1912. He had not heard of the Federal Statute before January 1, 1912. The second Employers' Liability Act was

not decided until January 5, 1912. The Peterson case was decided May 26, 1913, and the Seale case on the same day, both of them being decided after the argument of this case in the Wisconsin Supreme Court. Those decisions brought out an entirely new view as to the scope and effect of the Federal Employers' Liability Act. Is it any wonder then that the railroad company's attorney showed some diffidence and some greenness on this question?

Fifth: On page 31 of Counsel's Brief he cites the case of *La Crosse vs. Railway Company*, 64 Southern, 1012, as holding that no substantial rights were affected by trying a case under the State law instead of under the Federal law. This must be a miscitation, for this case makes no such holding.

Sixth: On page 47 of Counsel's Brief, and elsewhere, great reliance is placed upon the *Behrens* case, 233 U. S., 473, and we are criticised for not referring to this case. We contend it has no application. In that case the fireman had no duties with reference to permanent structures like roadbed, tracks, cinder pits, or anything of that kind. His duty related solely to the movement of trains. At the moment of his injury his employment had been segregated into an isolated transaction, relating solely to intrastate commerce. To have held other than was held would have resulted, of course, in excluding all intrastate work if *some part* of an employe's duty related to interstate commerce. This was obviously not within the meaning of the Federal Statute. However, we ask what would have been the conclusion in the *Behrens* case if this man were operating a switch engine, switching alternately, during the day, first interstate and then intrastate cars, and had stopped with his engine on a side track during the lunch hour to eat lunch, and then was injured by a collision, or if he was injured while crossing the tracks on his way to his work in the morning, as in the *Seale* case. It is obvious that it would be held that he was still "on duty" within the meaning of the *Zachery* case, and that he was "employed in interstate commerce." Otherwise, the effect would be that one while not actually engaged in the movement of interstate commerce would be excluded from all rights under the Federal Act, simply because at some moment in the day he performed some act in relation to intrastate commerce.

SPECIAL NOTE.

Just as we are finishing this brief our attention has been called to the case of *Pittsburg C. C. & St. L. Ry. Co. vs. Glinn*, 219 Fed. Rep., page 148 (C. C. A.), published in Advance Sheet, March 11, 1915.

In that case the deceased was engaged in a switching service. At the moment of his accident he was lining up switches to switch more cars. It was conceded that the cars handled by the decedent shortly prior to his death carried both interstate and intrastate freight.

Held, that the jury were authorized to find that he was engaged in interstate commerce at the time of his death.

The court says:

"However, we can draw no inference from these and other familiar decisions of the Supreme Court, (including the Behrens case, 233 U. S., 473, * * *) and the way in which they have interpreted the statute, save that liability is created where the service being rendered is of a *general indiscriminate character not segregated and tied to shipments within the state*, (as in the Behrens case, supra, * * *) but applicable as well to interstate commerce, which the carrier is conducting."

We submit that this case is a strong authority for our contention, that although Gray was not immediately engaged in either kind of service at the moment of his accident, yet his whole employment was of an *indiscriminate character*, and at the moment of the accident his service *was not segregated or tied to shipments within the state* and, therefore, he was employed in interstate commerce.

In conclusion, we submit that the judgment of the Supreme Court of Wisconsin should be reversed.

EDWARD M. SMART,

Counsel for Plaintiff in Error
Chicago and North Western Railway Company.

APPENDIX.**WISCONSIN RAILWAY EMPLOYERS' LIABILITY ACT.**

"Crippling or Death Damages. SECTION 1816. Every railroad company shall be liable for damages for all injuries whether resulting in death or not, sustained by any of its employes, subject to the provisions hereinafter contained regarding contributory negligence on the part of the injured employe:

Roadbed and Machinery Defects. (1) When such injury is caused by a defect in any locomotive, engine, car, rail, roadbed, machinery or appliance used by its employes in and about the business of their employment.

Fellow Employes' Negligence. (2) When such injury shall have been sustained by any officer, agent, servant or employe of such company, while engaged in the line of his duty as such and which such injury shall have been caused in whole or in greater part by the negligence of any other officer, agent, servant or employe of such company, in the discharge of, or by reason of failure to discharge his duties as such.

^A *Court's Questions to Jury.* (3) In every action to recover for such injury the court shall submit to the jury the following questions: First, whether the company, or any other officer, agent, servant or employe other than the person injured was guilty of negligence directly contributing to the injury; second, if that question is answered in the affirmative, whether the person injured was guilty of any negligence which directly contributed to the injury; third, if that question is answered in the affirmative, whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company, or any officer, agent, servant or employe other than the person so injured; and such other questions as may be necessary.

Comparative Negligence. (4) In all cases where the jury shall find that the negligence of the company, or any officer, agent, servant or employe of such company, was greater than the negligence of the employe so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover, and the negli-

grace, if any, of the employe so injured shall be no bar to such recovery.

Question for Jury. (5) In all cases under this section the question of negligence and contributory negligence shall be for the jury.

Contracts and Rules Subordinate. (6) No contract or receipt between any employe and a railroad company, no rule or regulation promulgated or adopted by such company, and no contract, rule or regulation in regard to any notice to be given by such employe shall exempt such corporation from the full liability imposed by this section.

"Railroad Company" Defined. (7) The phrase "railroad company," as used in this section, shall be taken to embrace any company, association, corporation or person managing, maintaining, operating, or in possession of a railroad in whole or in part within this state whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver.

Conflict of Laws. (8) In any action brought in the courts of this state by a resident thereof, or the representative of a deceased resident, to recover damages in accordance with this section, where the employe of any railroad company owning or operating a railroad extending into or through this state and into or through any other state or states shall have received his injuries in any other state where such railroad is owned or operated, and the contract of employment shall have been made in this state, it shall not be competent for such railroad company to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state.

Shop or Office Employes. (9) The provisions of this section shall not apply to employes working in shops or offices." (Wis. Stat. 1911, pp. 1312-13.)

MOTION TO AMEND ASSIGNMENT OF ERROR.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff in Error,

VS.

WILLIAM H. GRAY,
Defendant in Error.

SIR:—

Please take notice, that the plaintiff in error, Chicago and North Western Railway Company, will, at the regular motion day of the above entitled court, to-wit, March 22, 1915, at the opening of court on said day, or as soon thereafter as counsel can be heard, or in case the said cause shall be called for argument prior to said date, then at the time said cause is called for argument, move the court, as set forth in the annexed written motion.

Respectfully,

EDWARD M. SMART,
Counsel for Plaintiff in Error.

TO STEPHEN J. McMAHON,
Attorney for Defendant in Error.

Service of the above Notice of Motion admitted this 11th day of March, 1915, without prejudice, however, to the rights of the defendant in error.

STEPHEN J. McMAHON,
Counsel for Defendant in Error.

(Title.)

And now comes the above named plaintiff in error, Chicago and North Western Railway Company, and on the record herein, the briefs of counsel heretofore served and filed, and the affidavit of

Edward M. Smart hereto annexed, and moves this Honorable Court for leave to amend the Assignment of Errors in these proceedings, by adding to such Assignment of Errors, at the end of the seventh Assignment of Error, found on page seven of the Record (Transcript page 3), a further and additional Assignment of Error, in the following words, to-wit:

"Eighth: That the Municipal Court did not err in rejecting and striking out the testimony of the witness Armstrong, which was in substance as follows:

"Mr. Armstrong re-called by the defendant. I am familiar with the character and kind of business done by the Chicago and North Western Railway Company on our division at Antigo. As I understand it, interstate traffic is the exchange of business between two states.

Q. At and prior to the plaintiff's accident was the North Western road, its trains, engines and employes engaged in hauling cars of freight continuously between Michigan and State of Wisconsin and points in Illinois and State of Wisconsin?

A. Yes, sir.

Moved to have the answer struck out. Motion granted.

Objected to because it does not appear what employes are meant, and further objection is immaterial, incompetent and irrelevant as to whether their engines, their employes and their trains and crews may have or might have been in any respect engaged in interstate traffic, and that the only thing material, if at all, would be the use made of this particular engine, that is the engine on which the plaintiff was hostler.

By the Court: Objection sustained. The only question is as to this engine as I can see it; the engine on which this person was engaged at the time.

By Attorney Martin: My objection goes to all of these questions. 1st. Because the witness is not competent. 2nd. Because the testimony is not admissible under the pleadings. 3rd. The testimony itself is incompetent, irrelevant and immaterial.

Engines that were being hostled at this roundhouse at the time in question were making trips from Antigo to Ashland, going through Michigan. At the same time engines and trains were making connection with the Watersmeet branch (elsewhere appearing to be in Michigan). Engines running south won't run out of the state, but in coming to and going from the south they handle refrigerator cars from Chicago. The dispatcher is under the jurisdiction of the foreman of the roundhouse, and Mr. Gray was under the dispatcher's jurisdiction. The roundhouse is the place where all these engines

that come in from runs there rest. They clean all the coal and cinders out and get wood and water and are put in there to stay until the next trip. Some repairs are done in the roundhouse too. The dispatcher takes the engine, after the train crew leaves it, near the roundhouse. The roundhouse, with the coal shed, sand house and cinder pit and the blow-off box and these other buildings are all crowded together. I know of no definition in the railroad service as to what constitutes employes, or who shall be employed on the road, and no standard is fixed so far as I can see as to where the division line is.

Exhibit "9" is a photograph taken at or near the north end of the cinder pit looking south in the City of Antigo.

The plaintiff now moves to strike out all the testimony of this witness except his testimony identifying Exhibit "9", for the reason urged in our objection to the testimony when first offered, that is the testimony elicited from this witness since he was last called to the witness stand, and bearing generally upon the question of so-called interstate traffic.

The motion is granted as far as the testimony goes to the phase of interstate traffic.

Whereupon the defendant duly excepted.

The plaintiff moves to strike out the balance of the testimony, for the reason it is immaterial, incompetent and irrelevant, and now moves to strike it out.

The motion is granted.

Whereupon the defendant duly excepted." (Transcript pp. 236 to 238.)

Plaintiff in error submits the following Statement of Facts and Objects of this Motion:

This is a proceeding in error to review a decision and judgment of the Supreme Court of the State of Wisconsin, affirming a judgment of the Municipal Court of Outagamie County, Wisconsin, in a personal injury action brought by the defendant in error against the plaintiff in error, to recover damages on account of injuries received by the defendant in error, while in the employ of the plaintiff in error. The respective parties will be referred to as "Gray" and "Railroad Company".

Gray was run down and injured by an engine in the railroad yards at Antigo, Wisconsin, while employed by the railroad company as an engine dispatcher.

The complaint in the action was not brought under the Federal

Employers' Liability Act, and did not disclose that either Gray or the Railroad Company were employed in interstate commerce at the time of the injury. Gray, in presenting his case in the trial court, proved the facts showing the nature and character of his employment and duties, but did not disclose employment in interstate commerce. When the railroad company took the case, in addition to other facts proven in the case without objection, it introduced the evidence of the witness Armstrong, set forth in the above proposed additional Assignment of Error, which evidence was subsequently stricken out, as above set forth, for the reasons specified. It was claimed by the railway company that this proof, together with the other facts admitted in evidence, showed or tended to show employment by Gray in interstate commerce, and that if there was any liability on account of such injury it was governed and determined solely by the Federal Employers' Liability Act.

Judgment was rendered against the railway company in the trial court, and an appeal was taken to the Supreme Court of the State of Wisconsin, wherein the judgment of the trial court was affirmed in an opinion, decision and judgment of the said Supreme Court, which is fully set forth in the record. (Transcript 286, 293.)

The said Supreme Court held, under the evidence received, and the said evidence so stricken out as aforesaid, that the said Gray was not employed in interstate commerce. While it is true that in said court the error reviewed by it was the ruling of the trial court, striking out the said evidence, yet it is apparent from said opinion that the court treated the same as if admitted, and then determined the nature and character of Gray's employment from said evidence and all the other evidence in the case. That thereupon, the railway company filed its petition for Writ of Error, and made Assignments of Error, as set forth in the record. (Transcript pp. 3 and 4). That said record was filed in this court on the 2d day of August, 1913, and the same was printed, and copies thereof delivered to counsel for plaintiff in error on or about the 21st day of Sept., 1914. That copies of the said Assignments of Error and the record were exhibited to and seen by the counsel for the defendant in error some time during the month of July, 1913.

That on the 6th day of February, 1915, counsel for the railway company duly served upon counsel for Gray a copy of his original

brief; that a few days before March 1, 1915, counsel for Gray submitted to counsel for the railway company a copy of a part of the manuscript of his brief, wherein was set forth and argued the point that the Assignment of Errors and Specification of Errors were insufficient under the statutes and rules of this court, which said point and argument are now set forth on pages 32 and 33 of the printed brief of defendant in error.

That immediately upon receiving said manuscript brief, as aforesaid, counsel for the railway company reprinted his brief under the title of "Amended Brief of Plaintiff in Error," and added thereto a fourth "Specification of Error," which said fourth Specification of Error is found on pages 11 and 12 of "Amended Brief of Plaintiff in Error," in the same language as is set forth in the above proposed eighth Assignment of Error; that the said reprinted and amended brief was duly and personally served on counsel for Gray on the 1st day of March, 1915, at 10:30 A. M., as appears by the proof of service on file in this court, and thereupon thirty copies of the said "Amended Brief of Plaintiff in Error" were immediately and duly filed with the Clerk of this court, and are now on file herein; that at the time of the service of said amended brief of plaintiff in error the brief of defendant in error was in the process of being printed, and was thereafter completed and served on counsel for the railway company on the 3d day of March, 1915, at 5:30 P. M.; that counsel for the railway company had never, prior to the service of said manuscript, received any notice or intimation from counsel for Gray of his intention to make such a point, or his claim in regard thereto, nor has the said counsel ever made any motion in this court, based on the inadequacy of said Assignment of Errors.

That the failure of counsel for the railway company to make proper Specification of Errors was due to inadvertence and oversight, and due to the peculiar manner in which the question was raised, discussed and disposed of in the State Supreme Court, as more particularly set forth in the affidavit of counsel for the railway company hereto annexed.

Counsel for plaintiff in error submits the following authorities

on the proposition that this court has power and authority to permit amendment of Assignment of Errors, to-wit:

2 Encyclopedia Pleading and Practice, 920.

Ackley vs. Hall, 106 U. S., 428.

Bunyan vs. Loftus, 57 N. W., 685.

Hall vs. Railway, 84 Ia., 311.

Hubbard vs. Garner, 73 N. W., 390.

EDWARD M. SMART,

Counsel for Plaintiff in Error.

Dated March 10, 1915.

OCTOBER TERM, 1914.

No. 232.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Plaintiff in Error,

VS.

WILLIAM H. GRAY,

Defendant in Error.

STATE OF WISCONSIN, }
MILWAUKEE COUNTY, } ss.

Edward M. Smart being first duly sworn, on oath says that he is counsel for the above named plaintiff in error; that he has read the foregoing and annexed Motion and Statement of Facts and Objects of Motion, and that the facts and objects therein set forth are true, as he verily believes; that the failure to make an accurate Assignment of Errors in this proceeding was due entirely to affiant's inexperience in proceedings of this kind, and also to the inadvertence and oversight of affiant.

Affiant further says that proceedings by way of Writ of Error to review the decisions of inferior tribunals is not employed excepting in criminal cases and rare instances in the State of Wisconsin,

the common and statutory method of review in said state being by statutory appeal; that affiant has never, in any proceeding heretofore, excepting in one instance, sued out a Writ of Error; affiant further says that the reason why said proposed Assignment of Error was not made in the form now proposed was that because of the manner in which the said questions raised thereby were treated and discussed in the Supreme Court of the State of Wisconsin he was led to believe, and did believe, that the said court treated the evidence rejected the same as if it had been admitted, and decided the whole question the same as if said evidence had been admitted; that by reason thereof affiant inadvertently overlooked the fact that the said ruling was technically a ruling on the rejection of evidence, and for that reason an assignment of error should have been made in the form now proposed.

Affiant further says that no harm or prejudice has been done to the defendant in error, and the said defendant in error and the plaintiff in error have both fully set forth the facts and rulings in their respective briefs, and have fully set forth at length in said briefs the evidence so rejected.

Subscribed and sworn to before me this 10th day of March, 1915.

EDWARD M. SMART,

ALBERT M. KELLY,

Notary Public, Milwaukee County, Wisconsin.

My Commission expires Oct. 13, 1918.

OCTOBER TERM, 1914.

No. 232.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Plaintiff in Error,

VS.

WILLIAM H. GRAY,

Defendant in Error.

REPLY AFFIDAVIT.

STATE OF WISCONSIN, }
MILWAUKEE COUNTY, } ss.

EDWARD M. SMART, being first duly sworn on oath says:

That he has read the affidavits of William H. Gray, Stephen J. McMahon, Jeremiah F. Collins and Raymond T. Zillmer served upon him in the evening of March 13, 1915.

Affiant admits that after Mr. Gorman had made service of the "Amended Brief of Plaintiff in Error" as appears from the proof of service on file, the counsel for the Defendant in Error caused said briefs to be returned to and placed upon the desk of affiant in a sealed unmarked package by messenger unknown to affiant or the employee in his office;

That upon the said package being opened and contents examined, the same were enclosed in an envelope and remailed to Mr. McMahon, Attorney for the Defendant in Error, but by mistake a return card was left on the envelope and Mr. McMahon refused to receive the same and they were returned to affiant's office; that they were remailed to Mr. McMahon by the first mail thereafter in an envelope with postage prepaid and with no return card thereon, and the same have never been returned to or received by this affiant or by the plaintiff in Error or any one in its behalf.

EDWARD M. SMART.

Subscribed and sworn to before me this 15th day of March, 1915.

EDWARD M. SMART,

ALBERT M. KELLY,

Notary Public, Milwaukee County, Wisconsin.

My Commission expires Oct. 13, 1918.

Service of the foregoing is hereby accepted, and delivery of three copies thereof is hereby acknowledged this . . . day of March, 1915.

.....

*Counsel for Defendant in Error,
William H. Gray.*

IN EXPLANATION.

On February 6th, 1915, there was served on the attorney for the defendant in error and accepted, the brief of plaintiff in error. On March 1st, 1915, service of three copies of this brief, reprinted, with an addition to the specification in errors and an assignment of errors, was tendered to the attorney for the defendant in error and the service and the copies were by him refused.

About a week previous to this tender, a carbon copy of the major part of the typewritten manuscript of the body of the brief of defendant in error was delivered to the attorney for plaintiff in error and two days before the tender the balance of the copy of the manuscript was mailed to the same attorney. In the part of the manuscript delivered first issue was joined with all parts of the brief of plaintiff in error and insufficiencies of its specification of errors and assignment of errors were pointed out. Throughout the whole manuscript there were numerous references to the brief of plaintiff in error, citing the numbers of the pages. At the time of the tender of service all of the original of this manuscript was in the hands of the printer and the part in which issue was joined with the brief of plaintiff in error was in type. Tender of the service was refused for this reason and for the further reasons that expense and lack of time prevented a revision of the manuscript; that it was desired not to waive any defects in the assignment of errors and specification of errors in the brief of plaintiff in error; and that it was at least probable that the time for the plaintiff in error to serve and file its brief had expired. This brief is, therefore, addressed only to the brief of plaintiff in error as served in the first instance.

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Supreme Court of the United States

OCTOBER TERM, 1914, No. 232.

CHICAGO AND NORTHWESTERN RAIL- WAY COMPANY,	}
Plaintiff in Error,	
vs.	
WILLIAM H. GRAY,	
Defendant in Error.	

In Error to the Supreme Court of the
State of Wisconsin.

BRIEF OF DEFENDANT IN ERROR

I.

STATEMENT OF CASE.

This case was brought to this Court upon a writ of error to review a judgment of the Supreme Court of Wisconsin affirming a judgment of the Municipal Court of Outagamie County, in favor of the defendant in error and against the plaintiff in error, for damages for personal injuries sustained while in its employment.

Introductory Explanation.

Part of this brief is a reply to the brief of the plaintiff in error, served February 6th, 1915; and

a part fully as large is devoted to several questions which are not presented in that brief.

In the interests of brevity throughout this brief the plaintiff in error is referred to as "the company" and the defendant in error, Mr. Gray, as "Gray"; and the printed transcript of the record is referred to by use of the abbreviation "T."; and the Company's brief by use of the abbreviation "C. B."

Facts.

The facts are undisputed except upon the issues covered by findings made by a jury in a special verdict set forth fully herein.

On January 19th, 1911, Gray, then of the age of 51 years, 29 of which had been spent in the service of the company, was seriously and permanently injured, while employed by the company in the line of his duty as engine dispatcher or hostler [these latter terms being synonymous (T. 82)] in the *yards* of the company at the City of Antigo in the State of Wisconsin, by being struck by one of the company's locomotive engines then being driven by one of the company's engineers, as a result of the negligence of the engineer in the discharge of his duty as such. At the time of his injury, Gray was proceeding along a well-beaten foot path, customarily and frequently used by him and others, and extending between and parallel with a coal shed and a side track. He was going to his rest room or shanty which was just across this track to await the arrival of an engine to be hostled, or other duty to be performed, by him. He usually spent his leisure time in this rest room. It was necessary for him to cross this track to get to his rest room. There was arising from a cinder pit under the track near by a cloud of smoke, steam and gas which overhung the track and wholly ob-

secured his vision. Having stood, listened and made a futile attempt to look for an engine, as he was about to start to cross the track on his way to his rest room, he was struck by the side of the overhanging front part of the engine which came upon him without fault on his part, negligently and unexpectedly, in violation of a rule of the company, duly promulgated in an order or bulletin, and requiring engines delivered on that track to be hostled to be stopped south of the opposite or south end of the cinder pit, at an excessive rate of speed and without the bell on the engine being rung. (See findings 2, 3, 4, 6, 7, 9, 10 and 11, special verdict, post pp. 4-5.) If the statement contained in the first sentence on the top of page 2 of the company's brief to the effect that Gray was then "walking across one of the railroad tracks" is to be construed to mean that he was actually upon the track and not beside it when he was struck, the statement is erroneous. The engine was "drifting" which means moving by the force of its momentum, and was not puffing. Any noise made by the engine was rendered wholly inaudible, or indistinguishable by the sizzling noise produced by the throwing of cold water on the hot coals in the cinder pit nearby, which was the only noise which Gray could hear. On this foot-path, and at the point where he was struck, he had a maximum clearance of $4\frac{3}{4}$ feet; he had a minimum clearance of about $1\frac{1}{2}$ feet after allowing for the overhang of all parts of the engine, all of which were considerably above the ground, and not allowing for the numerous spaces, each 4 feet in length and 10 inches in depth, between the posts or studdings outside of the coal shed which gave him a maximum clearance of about $2\frac{1}{3}$ feet after allowing for the

overhang. He walked in the safest place open to him and was about to start to cross the track at a point opposite his rest room when he was injured. (T. 64, 67-8, 107-08, 111-14, 146-9, 182, 151-2, 154-5, 215-16, 222-23, 247, 254, 256.)

The location of the rest room and other features of the situation are amplified by the two photographs opposite page 280 (T. 238), as well as by the map and the photograph opposite pages 284 and 285 respectively of the transcript to which attention is called in the company's brief.

Gray duly commenced in the Municipal Court of Outagamie County, Wisconsin, a personal injury action for the recovery of damages from the company (T. 11-16). After joinder of issue, and a trial and argument before a jury of all issues of fact which were not abandoned (T. 24-256) the Court submitted to the jury a special verdict as requested by the company and substantially in the form proposed by the company, covering all of the disputes of fact in the case; and the questions in the special verdict were submitted to the jury under unusually full instructions, including among others 50 out of 52 instructions requested by counsel for the company. (T. 153, 257, 270.)

All of the questions and answers of the special verdict are as follows:

"1. Was the plaintiff, on the 19th day of January, 1911, struck by one of defendant's engines and injured?

Answer: Yes. (By the Court.)

2. Did the defendant, prior to the day of the plaintiff's injury cause an order to be issued providing in substance that engines delivered on coal shed track to be dispatched, should stop south of the cinder pit?

Answer: Yes.

3. If you answer question numbered two "yes," was such order abrogated prior to the day of the plaintiff's injury?

Answer: No.

4. If you answer question numbered two "yes" and question numbered three "no" then was Engineer Kane guilty of negligence in running his engine north of the cinder pit in violation of such order at the time plaintiff was injured?

Answer. Yes.

5. If you answer question numbered four "yes," then was such negligence of Engineer Kane a proximate cause of plaintiff's injury?

Answer: Yes.

6. Was the engine bell of the engine that struck plaintiff ringing at and immediately prior to the time of plaintiff's injury?

Answer: No.

7. If you answer question numbered six "no," then was Engineer Kane guilty of negligence in failing to cause the engine bell to be rung immediately prior to the time of plaintiff's injury?

Answer: Yes.

8. If you answer question numbered seven "yes," then was such negligence a proximate cause of plaintiff's injury?

Answer. Yes.

9. Under the circumstances existing was Engineer Kane guilty of negligence in running the said engine north of said cinder pit to the place where it struck plaintiff at the rate of speed at which he was running?

Answer: Yes.

10. If you should answer question numbered nine "yes," then answer this: Was such negligence a proximate cause of plaintiff's injury?

Answer: Yes.

11. Was the plaintiff guilty of any negligence which proximately contributed to his injury?

•Answer: No.

12. If you should answer the eleventh question "yes," then answer this: Was the said negligence of Kane greater than that of the plaintiff?

Answer: (No answer.)

13. If you should answer the twelfth question "yes," then did such negligence contribute in a greater degree to the plaintiff's injury than did that of the plaintiff?

Answer: (No answer.)

14. What sum will justly compensate the plaintiff for the injuries sustained by him?

Answer: \$7,815.00. Seven thousand eight hundred and fifteen dollars."

Without any pleading whatsoever covering the subject, (T. 11-19.) testimony was offered by the company for the first time near the conclusion of the trial, (T. 236.) *was received by the Court subject to objection*, and ultimately stricken out, as follows:

"Mr. Armstrong recalled by the defendant.

Q. Mr. Armstrong you are familiar with the character and kind of business done by the Chicago & Northwestern Railway Company on your division at Antigo?

A. Yes sir.

Q. Can you state whether or not that line of road in that division is constantly engaged in interstate traffic?

Objected to as immaterial and further that the witness is not competent to testify as to interstate traffic.

Q. Do you know what is meant by interstate traffic?

A. I believe I do, yes. It is the exchange of business between two states.

Q. At and prior to the plaintiff's accident was the Northwestern road its trains, engines and employees engaged in hauling cars of freight continuously between Michigan, and state of Wisconsin and points in Illinois and state of Wisconsin?

A. Yes sir.

Moved to have the answer struck out. Motion granted.

Objected to because it does not appear what employees are meant and further objection is immaterial, incompetent and irrelevant as to whether their engines, their employees and their trains and (T. 236.) crews may have or might have been in any respect engaged in interstate traffic, and that the only thing material, if at all, would be the use made of this particular engine, that is the engine on which the plaintiff was hostler.

By the Court: Objection sustained. The only question is as to this engine as I can see it; the engine on which the person was engaged at the time.

By Attorney Martin: My objection goes to all of these questions. 1st. Because the question is not competent. 2nd. Because the testimony is not admissible under the pleadings. And 3rd. The testimony itself is incompetent, irrelevant and immaterial.

Q. Were engines that were being hostled at this round house at the time in question making trips from Antigo to Ashland?

A. Yes.

Q. Did they go through Michigan?

A. Yes sir.

Q. And at the time were engines and trains making connections with the Watersmeet branch?

A. Yes sir.

Q. The engines running south wouldn't run outside the state?

A. No sir.

Q. Do these going and coming from the south handling refrigerator cars come from Chicago?

A. Yes sir.

Q. The dispatcher is under the jurisdiction of the foreman of the round house?

A. Yes sir.

Q. And Mr. Gray was under his jurisdiction?

A. Yes sir.

Q. As I understand it the round house is the place where all of these engines that come in from runs there rest?

A. Yes sir.

Q. And clean all the coal and cinders out and get wood and water and were put in there to stay until the next trip?

A. Yes sir.

Q. The round house with the coal shed, sand house and the cinder pit and the blow off box and these other buildings are all crowded together?

A. They are.

Q. You know of no definition in the railroad service as to what constitutes employees or who shall be employed on the road?

A. No sir.

Q. No standard fixed so far as you can say as to where the division line is?

A. No sir. (T. 237.)

Q. Mr. Armstrong I show you Exhibit "9" and ask you if that is a photograph taken at or near the north end of the cinder pit looking south in Antigo?

A. Yes, it is.

The plaintiff now moves to strike out all the testimony of this witness except his testimony identifying Exhibit "Y" for the reasons urged in our objection of the testimony when first offered, that is the testimony elicited from this witness since he was last called to the witness stand and bearing generally upon the question of so called interstate traffic.

The Motion is granted as far as the testimony goes to the phase of interstate traffic.

Whereupon the defendant duly excepted.

The plaintiff moves to strike out the balance of the testimony for the reason it is immaterial, incompetent and irrelevant and now move to strike it out. The motion is granted.

Whereupon the defendant duly excepted." (T. 238.)

Exhibit "Y" described above, by the witness Armstrong in these quoted words as a "*photograph taken at or near the north end of the circular pit looking south*" was later described in these identical quoted words by the learned counsel for the Company and offered as an exhibit with other exhibits and received as such. This all appears expressly in the printed transcript of the record (T. 238). As a matter of fact the original of the record in the Supreme Court of Wisconsin shows that in the offer of this exhibit the quoted words were preceded by a line as follows: "*Defendant also offers in evidence Defendant's Exhibit 'Y' being*" * * * This line is omitted from the printed transcript.

As appears from the map and photograph opposite page 284 of the transcript this exhibit "Y" is such photograph. (T. 238.)

The striking out of this testimony after it had been thus received subject to objection is all that there is in this case which in any way shows that

a question touching interstate commerce within the purview of the Federal Employers' Liability Act.

After the special verdict was returned by the jury, counsel for the company made in writing, 15 motions having for their purpose the avoiding of the verdict and every part thereof and the entry of judgment in its favor, or in the alternative the granting of a new trial. The 15th motion, a motion in the alternative for a new trial was expressly based on 13 grounds, the second ground being for the exclusion of testimony (T. 271-273.) After argument all of these motions were overruled and judgment was ordered and entered for Gray in accordance with the verdict. (T. 19-21, 273-274.)

The company appealed from the judgment of the trial court to the Supreme Court of Wisconsin.

After the submission of printed briefs and oral argument before all of the 7 members of the Court of last resort of this state, the judgment of the Municipal Court was affirmed; and all of the justices concurred in the opinion written by Mr. Chief Justice Winslow. (T. 19, 286-293.)

The decision of the Supreme Court of Wisconsin is reported in 153 Wisconsin Reports, 637, (official) and in 142 Northwestern Reporter, 505.

The case is here on a writ of error from this Court to the Supreme Court of Wisconsin.

Decision of Wisconsin Courts.

As has been pointed out the trial court struck out the company's testimony pertaining to the applicability of the Federal Employers' Liability Act after receiving it subject to objection; then the company moved for a new trial on the ground among others of error in the exclusion of testimony

and the motion was denied. On the appeal to the Supreme Court of Wisconsin, a question as stated in its decision was raised as follows:

"Winslow, C. J.,

The appellant makes five contentions, viz: . . .; . . .; (3) that the court erred in refusing to receive evidence tending to show that the plaintiff was employed in interstate commerce at the time of his injury; . . .; . . .; these contentions will be discussed in their order." (T. 289.)

The final conclusion and decision of the Supreme Court of Wisconsin as to this 3rd contention is as follows:

"III. . . .; We conclude, therefore, that there was no error in these rulings." (T. 290-292.)

The enumeration of the contentions was preceded in the decision of the Supreme Court of Wisconsin by a rather full statement of the case, in which the special verdict was set forth fully; (T. 286-289) and this enumeration is followed by a full discussion of all of the contentions in which appears the Court's conclusion as to the 3rd as set forth above. (T. 289-293.) After this discussion of all of the 5 contentions the decision ends with the following disposition of all other questions in the case:

"There are no other contentions which require treatment.

By the Court: *Judgment affirmed*" (T. 293).

Questions Involved.

This conclusion of the Wisconsin Supreme Court as to the striking out of this testimony as heretofore set forth, is all that there is in this case, in any way touching interstate commerce within the purview of the Federal Employers' Liability Act, to be reviewed by this court upon this writ of error.

The questions presented by the record and now desired raised are as follows:

1st. Whether this court has jurisdiction?

This question is divisible into two parts as follows:

(A) Whether this court has failed to acquire jurisdiction because of a defect in the writ of error not susceptible of amendment?

(B) Whether the decision of the Federal question is sufficiently *necessary, controlling or material* to the decision of the case to render it sufficiently devoid of frivolousness to sustain *jurisdiction*?

2nd. Whether if this court does entertain jurisdiction it is sufficiently clear that the error complained of (*if error*) has worked *prejudice to the substantial rights* of the company to such an extent as will *require reversal*?

3rd. Whether the Supreme Court of Wisconsin erred in affirming the decision of the trial court by refusing to grant a new trial because of error in the rejection of the testimony pertaining to interstate commerce offered by the company?

4th. Whether Gray is entitled to damages in this court?

The third is the only question touched upon in any way in the company's brief. (C. B. 11.)

This statement of the case will be supplemented in the argument.

II.

ARGUMENT.

1st. This Court has no jurisdiction.

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, . . . This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

F. R. S. Co. v. Hagg, 219 U. S. 175 at 177.

M. C. & L. M. R. Co. v. Swan, 111 U. S. 379.

Hilton v. Dickinson, 108 U. S. 165.

(A.) The first question is whether this Court has failed to acquire jurisdiction, because of a defect in the writ of error not susceptible of amendment.

The writ is *jurisdictional*; and because of the gravity of any question of *jurisdiction* it is deemed a duty to call the court's attention to the question, even though in the solution of it there may arise only doubt.

Section 1004 Revised Statutes as amended by *Act of Jan. 22, 1912, (37 Stats. L. 54.)*, provides that writs of error returnable to this Court may be issued by the "Clerks of the district courts," or others enumerated in the statute.

This writ was not issued or signed, by a clerk, but by a deputy (T. 1.); and the absence of the clerk is not accounted for.

There is no express statutory provision authorizing the writ to be issued by a *deputy clerk*.

Previous to 1901, a statute provided that "*all clerks of the United States Courts*" were authorized to administer oaths; this statute was likewise silent upon the authority of a deputy clerk.

Act of May 28, 1896, Ch. 252. Section 19, (29 stats. L. 184.)

Notwithstanding that this statute was applicable to "*all clerks*," congress apparently deemed it necessary to amend the act so as to include *deputy clerks* by an amendment, bringing into the statute the words "*and all deputy clerks*." This was the only amendment embodied in the amending act.

Act of March 2, 1901, Ch. 814, (31 Stats. L. 596.)

It is significant that the *intention* of congress not to include "*all deputy clerks*" in legislation conferring power on "*all clerks*," was manifested previous to the enactment of the statute conferring on "*clerks of the district courts*" the power to issue writs of error.

It is also significant that the *intention* of congress thus manifested was manifested subsequently to all of the decisions about to be cited; and these include decisions tending to sustain the sufficiency of the writ as well as those tending to sustain the contrary view.

By analogy in principle, at least, these cases tend to sustain the view that "a deputy clerk" of the district court has no power to sign or issue a writ of error unless the absence of the clerk is accounted for.

Havenor v. New York, 170 U. S., 408.

Willock v. Wilson, 178 Mass., 68; 59 N. E. 757.

United States v. Antz, 16 Fed. 119 at 122.

There is no authority permitting an amendment of the writ unless the defect suggested be a defect "of form."

Revised Statutes, Section 1005.

"This writ is not mere matter of form, but matter of *substance*, prescribed by law, and essential to the *jurisdiction* of this court. And if it were amended here, by making the plaintiffs in error defendants, and the defendant in error the plaintiff, it would be a new writ made here, and not the one issued by the officer appointed by law

The case (*Hines v. Papin.*) was, indeed, even stronger for the amendment than this, for counsel appeared in this court for each of the parties, and offered to amend by consent. Yet the court refused to amend, upon the ground that consent of parties would not give jurisdiction, where it was not given by law and legal process It is the duty of the party who desires to bring a case before this court, to see that proper and legal process is sued out for that purpose; and if he fails to do so, he has no right to treat the defect as a mere *clerical* error, for which he is not to be held responsible."

Hodge v. Williams, 22 Howard, 87, at 88 to 89.

"But the want of a writ of error, such as is prescribed by the act of Congress, stands on different ground. And in the case of the *United States v. Curry*, 6 How., 118, the court held, that where the power of the court to hear and determine a case is conferred by

acts of Congress, and the same authority which gives the jurisdiction points out the manner in which it shall be brought before us, *we have no power to dispense with the provisions of the law, nor to change or modify them.*"

Carroll v. Dorsey, 20 Howard, 204, at 207 and 208.

The foregoing cases call for a strict construction of and compliance with statutes governing the issuance of writs or error.

Decisions, *not involving writs of error, however*, which tend to sustain the view that a "deputy clerk" has power to issue and sign a writ of error are:

The Confiscation Cases, 20 Wall. 92, at 111.

Garpeau v. Dozier, 100 U. S., 7.

The first of these cases involves the issuance of a warrant and the second the certification of a transcript—*both ordinary routine duties of a clerk*, but the case at bar involves the signing and issuing of a writ of error giving to this Court, the highest court of the land, its jurisdiction—*acts giving vitality to the writ and requiring the performance of an unusual duty and the exercise of extraordinary power.*

There is authority, some of which, at least, is *dicta*, tending to support the view that a defect of the character of the suggested defect is a defect in form only.

Miller v. Texas, 153 U. S., 535.

It is desired that this branch of the argument be not pressed beyond the imperative requirements of the duty attempted to be discharged by it.

(B.) The decision of the federal question is not sufficiently *necessary*, controlling or material to the decision of this case to render it sufficiently devoid of frivolousness to sustain the *jurisdiction* of this court.

Facts.

As heretofore pointed out (ante p. 4) every disputed question of fact was determined by the jury in its special verdict and resolved in Gray's favor.

In this branch of the argument it will be assumed that the trial court refused to strike out all of the testimony offered by the Company upon the question of interstate commerce and received subject to objection as heretofore fully set forth (ante p. 6). It will be further assumed, *solely for the purpose of the argument, and without in any way conceding it to be the fact*, that this testimony offered by the Company on the question of interstate commerce established that Gray was engaged in a task of interstate commerce at the moment of his injury within the purview of the Employers' Liability Act (*the negative of this latter assumption is in fact vigorously maintained in the third branch of this argument*, (post, p. 32), as well as establishing *merely*, as it did, that the company was an interstate commerce railroad.

Application of Law to Facts.

No attack is made in the Company's brief upon the findings of fact made by the jury in its special verdict. By silence in this respect in its brief the Company concedes that these findings are not now open to attack. Furthermore, no error is assigned because of error in the instructions upon the law

given to the jury by the trial court before the jury retired to consider its special verdict.

It would avail the Company nothing to attack the findings of fact made by the jury because in the absence of error in the instructions or directions to the jury, this court will not review or disturb these findings for the reason that upon a writ of error, this court will not review or disturb findings of fact made by a jury in a state court; this court will regard such findings as a verity in the record and binding upon this court, and will review only the questions of law arising upon such findings.

Willoughby v. Chicago, No. 2 U. S. S. C. Adv. Op., 1914, p. 23 (Dec. 15).

S. A. L. Ry. v. Duvall, 225 U. S., 477.

S. O. Co. v. Brown, 218 U. S., 77.

W. P. O. Co. v. Texas, 212 U. S., 86.

Telluride Power Transmission Co. v. R. G. Co., 187 U. S., 569.

All questions of fact on undisputed evidence are for the court and not the jury, and the court's finding will likewise not be disturbed or reviewed by this court on a writ of error.

Patton v. T. P. Ry. Co., 179 U. S., 658.

Graber v. D. S. S. & A. Ry. Co., 150 N. W. (Wis.), 489, *infra*. (C. B. 15.)

"There shall be no reversal in the Supreme Court * * * upon a writ of error * * * for any error in fact."

Revised Statutes, Sec. 1011.

**Result Same Under Federal as Under
Wisconsin Act.**

Assuming, for the purposes of the argument only, as heretofore suggested that none of the evidence offered by the Company had been stricken out and that it established Gray as well as the Company to be in interstate commerce within the purview of the Federal Act, it is found that under the findings of fact made by the jury, the result—the judgment in form, substance and amount—would be exactly the same under the Federal Act as under the Wisconsin Act.

For convenience of comparison and reference the Federal and Wisconsin Acts are set forth fully verbatim in an appendix. (Post, pp, 74, 75.)

The only negligence found by the jury in its special verdict is the *threefold* actionable negligence of the Company's engineer, Kane, a fellow servant of Gray, who drove the engine that struck Gray (ante, p. 4). Section 1 of the Federal Act and Section 2 of the Wisconsin Act (post, p. 74) impose liability upon the Company for the engineer's negligence.

In the 11th finding of the special verdict the jury found that Gray was *not guilty of contributory negligence*.

Under Section 3 of the Wisconsin Act (post, p. 75), if the jury had found Gray guilty of contributory negligence it would have been the duty of the jury to answer the 12th and 13th questions in the special verdict and thereby make findings respectively as to whether the engineer's negligence was greater than Gray's, and also whether it contributed in a greater degree to Gray's injury; but

the 12th and 13th questions became wholly *immaterial* since Gray was found *not guilty of contributory negligence*.

Upon the whole record, and in view of all provisions of both Acts, if the disputed issues of fact has been submitted to the jury under the Federal Act the same *identical* questions of the special verdict would have to be submitted to the jury with the exception of the 12th and 13th, now wholly *immaterial* under either act, in view of the jury's answer to the 11th question, acquitting Gray of contributory negligence.

Under Section 3 of the Federal Act, in submitting to the jury the 14th question of the special verdict, which required the jury to assess Gray's damages (post, p. 76), it would have been appropriate to instruct the jury that if they found Gray "*guilty of contributory negligence*," it would "not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe," or in other appropriate words answering the requirements of this section of the Federal Act; *but since the jury found that Gray was not guilty of contributory negligence, it is now wholly immaterial under the provisions of the Federal Act that this instruction was not given.* Without contributory negligence on Gray's part there was no provision of law requiring or authorizing that "the damages shall be diminished by the jury" or otherwise or for any cause.

In the Company's brief it is stated that the case was submitted to the jury under the "Wisconsin Railroad Law." (C. B. 8.) If by this it is meant to suggest that the form of the verdict is now in any way *material*, the suggestion is erroneous. The

only thing in the special verdict to indicate that it was submitted under the Wisconsin Act is the insertion of the 12th and 13th questions. As pointed out, they became wholly *immaterial*.

Furthermore, there is not a syllable in the lengthy instructions given to the jury in any way indicating to the jury which Act governed. There was nothing erroneous or prejudicial in the instructions under either Act. (T. 257-269.) Nothing erroneous or prejudicial is pointed out in the Company's brief.

The construction of the Federal Employers' Liability Act was not in any way involved in the instructions given to the jury by the trial court.

Seaboard Air Line Ry. v. Duvall, 225 U. S., 477.

A careful examination of all of the evidence offered, disputed and undisputed, coupled with a careful examination of all of the provisions of both Acts, demonstrates that every issue of fact raised in the case is covered by the findings in the special verdict.

There are some differences between the provisions of the two acts; *but there are no facts whatever pleaded or proven which would work any difference in the result because of differences in the provisions.*

To illustrate, Section 4 of the Federal Act preserves the defense of assumption of risk except "where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

But there is no allegation or proof by the Company of any assumption of risk by Gray; neither

is there any allegation or proof by Gray of violation by the Company of any statute enacted for the safety of employes which contributed to Gray's injury.

The Wisconsin Supreme Court found that while there was evidence upon which the jury might have found Gray guilty of contributory negligence the question of his contributory negligence was a proper one for the jury and not for the Court (T. 286-290.); and this evidence is the only evidence anywhere in the record of fault on Gray's part. This evidence of fault on Gray's part is based wholly on Gray's undisputed testimony and testimony covered by the findings of the jury. (T. 288-289.) As a matter of law none of this evidence tends in any way to establish assumption of risk on Gray's part.

Y. & M. V. Ry. Co. v. Wright No. 4 U. S. R. C. Adv. Op., 1914, p. 120 (Jan. 15).

Seaboard Air Line v. Horton, 233 U. S., 492 at 503.

Other immaterial differences in the Federal Act and Wisconsin Act might be pointed out; but there are no facts pleaded or attempted to be proven, in the case at bar in any way involving such differences.

Under either act the result—the form, substance and amount of the judgment—must be the same.

No Federal Question Sufficient to Give This Court Jurisdiction.

The writ of error at bar is sued out under Section 237 (formerly Revised Statutes, Sec. 709) of the

Judicial Code. (T. 34.) The part of this Section which gives the Court jurisdiction in the case at bar provides for a writ of error from this court to the State Court:

"where any title, right, privilege, or immunity is claimed under . . . any . . . statute of . . . the United States, and the decision is against the title, right, privilege, or immunity expressly set up or claimed."

It is apparent from a more examination of this phraseology that to give this court jurisdiction there must be a denial of a right, privilege or immunity; that such denial must be injurious or prejudicial to the party complaining; and that such denial must be real, substantiated and prejudicial, and not imaginary or speculative.

The mere fact that an action or a defense is based on a Federal statute or that there is a Federal statute involved or applicable is not sufficient to give this court jurisdiction; but in addition it must appear affirmatively from the whole record that there is a real and substantial dispute or controversy as to the construction of a Federal statute and the effect thereof upon the determination of which the final result of the action and the rights of the parties must ultimately depend.

U. S. L. Co. v. Small, 225 U. S., 477.

Consolidated Turbine Co. v. U. S. S. F. R. Co., 220 U. S., 336.

Little v. Brown, 226 U. S., 347.

McCain v. Los Union, 225 U. S., 330.

This rule of construction of Section 237 of the Judicial Code is by analogy sustained by cases from this court construing Section 28 of the Judicial Code which gives the Federal Courts jurisdiction of cases removed from State courts in suits

“arising under the Constitution or laws of the United States.”

Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S., 239.

Shoshone Mining Co. v. Rutter, 177 U. S., 505.

Defiance Water Co. v. Defiance, 191 U. S., 184.

In these removal cases a similar rule is applied in determining the *scope* of the jurisdiction of the Federal courts.

Applying the foregoing rule for the construction of the *scope* of Section 237 of the Judicial Code to the case at bar, it follows that, since, as heretofore pointed out, the result in the case at bar,—that is to say, the judgment,—must be the same under the Federal statute as under the Wisconsin statute, upon the undisputed facts, including the evidence offered by the company, received and finally rejected, and the findings of the jury, which cover all of the disputed facts, there is in the case at bar no *real or substantial dispute or controversy as to the construction of a Federal statute and the effect thereof, upon the determination of which the final result of the action and the rights of the parties*

must ultimately depend, and that therefore, this court has no jurisdiction.

This rule governing *jurisdiction* of this Court under Section 237 of the Judicial Code, to the effect that there must be a real or substantial dispute or controversy of the character just stated in the phraseology in italics, is well illustrated and sustained in a long line of cases from this court which, it is respectfully submitted, are in point with the case at bar, and which lay down well-settled, familiar elementary principles—the mere statement of which is sufficient, as follows: that the decision of the Federal question must be *material* and *necessary* to and *controlling* in the decision of the case and *devoid of frivolousness*; that there must be an *affirmative* and *substantially unambiguous* showing that the decision assailed rested on the Federal question *alone* and that no other sufficient consideration also induced the conclusion of the State court; that if there is another and distinct ground beside the Federal ground upon which the judgment of the State court can be sustained, this court has no jurisdiction; that to give this court jurisdiction the decision of the State court must be actually against and in denial of some real and substantial right under a Federal statute; that if the State court has not actually in effect withheld a benefit under a Federal statute, this court will not entertain jurisdiction; that in determining the question of jurisdiction this court is not limited to a consideration of the decision of the State Court upon the Federal question only; but this Court may put its decision on other grounds; and that, if the decision of the State Court *was* or *might have been* based on two grounds, one involving a Federal question and the other involving a non-Federal

question, and the decision of the non-Federal question is based upon grounds sufficient and broad enough to sustain the judgment, without being based upon Federal grounds, this court has no jurisdiction. These principles of law are supported by so many decisions of this court and so uniformly, that it is necessary to cite but a few of the cases illustrating these principles.

E. L. Co. v. Pierce, No. 4 *Adv. Op. U. S. S. C.*, Jan. 15, 1915, p. 133.

Adams v. Russell, 229 U. S., 353.

Consolidated Turnpike Co. v. N. & O. V. R. Co., 228 U. S., 596.

Deming v. C. P. Co., 226 U. S., 103.

S. A. L. Ry. v. Duvall, 225 U. S., 477.

I. Ry. Co., v. Olathe, 222 U. S., 187.

Berea College v. Kentucky, 211 U. S., 45.

A. S. R. R. Co. v. German Nat. Bk., 207 U. S., 270.

Leathe v. Thomas, 207 U. S., 93.

Harrison v. Morton, 171 U. S., 38.

Chemical Bk. v. City Bank of Portage, 160 U. S., 646.

Mo. Pac. Ry. v. Fitzgerald, 160 U. S., 556.

R. R. Co. v. Central V. R. Co., 159 U. S., 630.

Eustis v. Bolles, 150 U. S., 361.

Hammond v. Johnston, 142 U. S., 73.

Johnson v. Risk, 137 U. S., 300.

De Saussure v. Gaillard, 127 U. S., 216.

Murdock v. City of Memphis, 87 U. S., 590,
(20 Wall.)

Kennebec R. R. v. Portland R. R., 81 U. S.,
23, (14 Wall.)

Gibson v. Chouteau, 75 U. S., 314, (8
Wall.)

In dismissing a writ of error to a state court for want of jurisdiction because the decision of the state court was held to be based upon non-Federal grounds although there were Federal grounds relied on in the case, this court used the following significant language in *I. Ry. Co. v. Olathe*, 222 U. S., 187 *supra*, at p. 190:

“The judgment would have been the *same* had the resolution not been adopted at all. No effect whatever has been given to it by the state court and this court is without jurisdiction to review its judgment.”

Since, as heretofore pointed out, the result of the case at bar must be the same under either the Federal law or the Wisconsin law, it follows that the facts of this case, under the view taken by the company, do not satisfy the requirements of these well-settled elementary, familiar principles.

On the other hand, it appears affirmatively, as pointed out in the statement of the case (*ante*. p. 11) that it is apparent that the Supreme Court of Wisconsin considered, had in mind, and appreciated that there were other questions in the case besides the federal question, and that the Supreme Court of Wisconsin considered, had in mind, and appreciated all of the questions in the case, including

the non-Federal question as to whether there were other grounds sufficient and broad enough in themselves to sustain the judgment of the trial court without deciding or necessarily relying upon the decision of the Federal question alone. The final conclusion of the Wisconsin Supreme Court made after discussion and decision of certain specific questions, including the Federal question, is most significant and is as follows:

"There are no other *contentions* which require treatment.

By the COURT: *Judgment affirmed.*"

This language of the Supreme Court of Wisconsin is, it is submitted, sufficient to indicate that the state court did decide the non-Federal question and, as pointed out, the decision of the non-Federal question is sufficient and broad enough to sustain the judgment of the state court irrespective of the decision of the Federal question.

Even if the Supreme Court of Wisconsin did not base its decision on the sufficiently broad non-Federal grounds, the result in this court must be the same for if the Wisconsin court could have based its decision on a non-Federal ground but did not do so, no injurious or prejudicial consequences have been visited upon the company by the final result in the state court.

The following language is quoted from the case of *Kennebec R. R. v. Portland R. R.*, 81 U. S., 23 at p. 26 (14 Wall.), which is a case which involves a Federal question as well as a non-Federal question:

"Here is, therefore, a clear case of a *sufficient* ground on which the validity of the decree of the state court *could* rest even if it had been in error as to the effect of the

act of 1857 in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the state court, we cannot take jurisdiction, because we could not reverse the case *though the Federal question was decided, erroneously in the court below, against the plaintiff in error.*

The writ must, therefore, be DISMISSED FOR WANT OF JURISDICTION."

Even if the Wisconsin Supreme Court *had* not based and *could* not base its decision upon the non-Federal ground as well as the Federal ground it is respectfully submitted that there is no sound reason in principle now why this court *should* not base its decision on the non-Federal ground, irrespective of what the Wisconsin Supreme Court *did* or *could* have done with the non-Federal ground in the case. This court is not limited to a consideration of the decision of the state court based upon Federal grounds, but, on the contrary, this court will inquire into and base its decision upon non-Federal grounds if there are such in the case and they are sufficient and broad enough to sustain the judgment of the state court.

Florida v. Croom, 226 U. S., 309.

G. C. & S. F. Ry. v. Dennis, 224 U. S., 503.

2nd. Even if this court does entertain jurisdiction, it is not sufficiently clear that the error complained of (if error) has worked *prejudice* to the *substantial* rights of the company to such an extent as will *require* reversal.

Facts.

This branch of the argument is based upon the same facts and assumptions of fact as those set

forth in the previous branch of the argument, subdivision B. of the 1st part of the argument.

Application of Law to Facts.

The rule is well settled that this court will not reverse a judgment of a state court upon a writ of error unless it is made to appear affirmatively, clearly and conclusively, and the contentions advanced are not frivolous, that error has been committed by the state court to the *prejudice* of the *substantial* rights of the party complaining of error; and where the party complaining of error fails to make a showing satisfying fully the requirements of this rule of law, the judgment of the state court will be *affirmed*. There is an abundance of authority from this court illustrating and sustaining this rule, among which are the following cases:

S. R. Co. v. Gadd, 233 U. S., 572.

S. A. L. Ry. v. Moore, 228 U. S., 433.

Holmes v. Goldsmith, 147 U. S., 150.

Lancaster v. Collins, 115 U. S., 222.

Jenkins, Assignee, v. Loewenthal, 110 U. S., 222.

The "Wanata," 95 U. S., 600.

Murdock v. City of Memphis, 20 Wall., 590.

This rule, in its fullest scope, has been applied to cases, such as the case at bar, involving the *exclusion of evidence only*.

Hornbuckle v. Stafford, 111 U. S., 389.

Cannon v. Pratt, 99 U. S., 619.

Gregg v. Moss, 14 Wall., 564.

In a case involving the Federal Act in question in the case at bar, it was held squarely that there was *no prejudice* to the *substantial rights* of the railroad company where it appeared upon the *whole record* that the result, that is to say, the judgment, would be the same under the law of Louisiana as under the Federal Act.

La Casse v. N. O. T. & M. R. Co., 64 So. (La.) 1012, *infra*.

It is most significant that in the case at bar, the learned counsel for the company has wholly failed to point out in his brief any respect in which *prejudice* of any kind to the *substantial* or other rights of the railroad company has been worked in the case at bar. The learned counsel has wholly failed to even suggest the possibility of *prejudice* or *injury* to any of the rights of the company.

Where it appears *affirmatively upon the whole record*, as it does appear in the case at bar and as has been heretofore pointed out that there has been no error committed which is *prejudicial* to the *substantial* rights of the company, every presumption of error that might, by any possibility arise, is entirely overcome.

S. A. L. Ry. v. Duvall, 225 U. S., p. 477.

This court has held that if the court can "*find nothing giving rise to a clear conviction on*" its "*part that error has resulted from the action of the courts below*" the judgment of the lower courts will be affirmed.

Seaboard Air Line Ry. v. Moore, 228 U. S., p. 433.

C. J. Ry. Co. v. King, 222 U. S., p. 222.

It is desired to place *emphasis* on this rule before entering on the next, the 3rd, branch of the argument.

3rd. The Supreme Court of Wisconsin did not err in affirming the decision of the trial court, refusing to grant a new trial because of error in the exclusion of the testimony pertaining to interstate commerce offered by the company.

Inadequacy of Assignment and Specification of Errors.

This is the only contention touched upon in the Railway Company's Brief (C. B. 11). The affirmative of this contention raises the only question which can be raised involving the construction or application of a Federal Statute; and this question cannot be enlarged or changed in any way by Counsel's assignment of errors, or by his specification of errors. If counsel's assignment of errors (T. 2-3) or specification of errors (Company's Brief pp. 10-11.) must be or is to be construed so as to enlarge or change the question thus involved, they are helpless in so far as they work an enlargement or change in this question and to the extent of such enlargement or change they cannot be reviewed by this court.

"It is equally well settled that the contention made and passed upon in the state court cannot be enlarged by assignments of error made to bring the case to this court. This proposition is too well settled to need discussion." (Numerous cases cited.)

Cleveland & P. R. Co. v. Cleveland, 59 U. S. Supreme Court, 21, (U. S. Supreme

Court Advance Opinions, No. 2, Dec. 15, 1914.)

No error is assigned because of the striking out of the testimony. (T. 2-3.)

Questions raised by the plaintiff in error are required to be covered by the assignment of errors.

Revised Statutes, Sec. 999.

Green County v. Thomas' Executor, 211 U. S. 598.

"When the error alleged is to the * * * * rejection of evidence, the specification shall quote the full substance of the evidence * * * * rejected." (Sub. Sect. 2, Sect. 2, Rule 21 of this court.)

"And errors not specified according to the rule will be disregarded; but the court at its option may notice a plain error not assigned or specified." (Sect. 4, Rule 21 of this court.)

It is observed that the specification of error contained in the Company's Brief (T. 10-11.) does not "quote the full substance of the Evidence * * * * rejected" as required by the rule.

That there is no "plain error" in the record is pointed out herein.

Facts.

All of the *admitted* facts which bear in any way upon the question of interstate commerce are undisputed.

Gray's *principal* and *primary* duty as alleged in the complaint and *admitted by the company's answer*, was to receive engines delivered to him at the cinder pit in the Antigo yards, after they had wholly completed their runs and hostile them.

His duty with respect to the hostling of an engine consisted of driving it on to the cinder pit, to have the fire knocked out of it, then driving it to the coal shed to have coal put in the tender, then driving it to the water-tank to have water put in it, then driving it to the wood pile to have it furnished with wood, then driving it to the turn table at the round house and then driving it in to the round house and leaving it there to remain until it was taken out by some other engineer on another run.

In the hostling of an engine, Gray merely drove or operated the engine and others did the other work required in connection with the hostling of the engine.

His duties were all performed on that portion of the cinder pit track between the cinder pit and the round house. (T. 12-13, 16-17, 65, 79-80, 45-46.)

There is no proof whatever in support of the allegations of the complaint to the effect that Gray drove the engines in switching cars about the yards or that he caused water and steam to be discharged from the engines into the blow-off box. The statements to the contrary in the Company's Brief are erroneous. (C. B. 3.)

Apparently all duties performed by Gray other than the hostling of engines were merely incidental to his *principal* and *primary* duty of hostling engines in that portion of the yards referred to.

There were 30 engines hostled at that point every 24 hours and half of this number were hostled by Gray with the aid of his assistant. (T. 159.)

A "yard" is defined in the Company's Rule Book as follows:

"A system of tracks within defined limits provided for the making up of trains, storing

of cars and other purposes, over which movements not authorized by time table or by train order may be made, subject to prescribed signals and regulations." (T. 149.)

Gray went to work on the day of the injury at 6 a. m. He was required to be on duty from 6 a. m. to 6 p. m. (T. 78-79.) He was injured shortly before 10 a. m. (T. 66.)

He had hostled three or four engines on that day previous to his injury. (T. 65, 79-80, 183.)

After hostling these engines, he left the Company's yards and went up town at about 8:15 a. m. (T. 81-82, 212.) to the Company's depot for the purpose of getting his pay check (T. 84, 212.), and for the further purpose of getting it and the pay check of one of the other engineer's cashed. He got the other engineer's check cashed at the grocery store of the City Treasurer across the Railway tracks from the depot. The grocer did not have money enough to cash Gray's check also and Gray went into a saloon just across the street from the grocery store to get it cashed. He was unable to get it cashed there. He purchased a glass of brandy and went directly back to the round house. He was gone about 50 minutes (T. 85-89.) He remained at the round house about 35 minutes, spending part of the time in the toilet room and part of it loitering in the engineer's room. He started from the round house to go back to his rest room and when he got to the sand house on his way to the rest room, he noticed smoke, steam and gas arising from the cinder pit and it occurred to him to go over to the cinder pit to see if the cinder pit man was putting water on the coals in the cinder pit. (T. 90, 67.)

When he got to the cinder pit after returning from getting his check, attempting to get it cashed, etc., going to the round house, thence to his rest room by way of the sand house, he said nothing whatever to the cinder pit men and did nothing with reference to him or the cinder pit but to merely look at the cinder pit men for a moment and then he immediately started to walk back to his rest room. (T. 67.)

He had given no directions to the cinder pit men with reference to wetting down the cinders subsequently to going to the depot to get his check and get it cashed. (T. 81-83, 85-87, 143.)

It was *primarily* the duty of the cinder pit men and not Gray's duty to keep the cinders in the pit wet down by throwing water on them. (T. 86.)

We quote from Gray's testimony as follows:

Q. Then when you started back, what route did you take?

A. I took the route between the coal shed and the west rail.

Q. Was that the usual way?

A. Yes, I have walked there thousands of times.

Q. As you walked back, were whistles or any you were engaged in this regard and other?

A. I was completely engaged.

Q. Couldn't see your way?

A. No sir.

Q. Where were you going?

A. I was going to the shed.

Q. What for?

A. To stay there until there was work for me.

Q. What would be with an engine when it?

A. It is on.

Q. How did you group your eye?

A. I grouped my eye along the coal shed, along the entrance of the coal shed—I grouped my eye with them.

Q. How did you know where the steam was?

A. I had to guess at it.

Q. Can you tell what happened and how it happened and what you did?

A. I got down about, in my judgment, in front of the steam, and the steam was so thick I couldn't see my hand in front of me, and I stopped and listened for an engine and I couldn't hear one. I could hear a noise that water would make in hot steam by passing water on.

Q. What was it a noise like to you?

A. My explanation of that would be, I guess everybody must have heard it, it would be similar something to hearing a can of water or a pail of water on a pile of hot iron. It would make about that noise.

Q. Can you tell me what you did?

A. I listened and couldn't hear anything and I made up my mind that something was close and I walked my leg to make a step across the track and I got off.

Q. Can tell by what?

A. That engine.

Q. How's engine?

A. Yes sir, well, that is, I didn't know at the time where engine it was or who was running it.

Q. What happened to you?

A. I got hit in the face and I fell against the shed with my shoulders and the back of my head and I fell to the ground.

Q. Was it the first stroke of the engine that threw you against the shed?

A. Yes sir.

Q. And when you fell to the ground what happened?

A. I rolled over this way (indicating how) back towards the shed to get my legs and arm out of the way of the wheels and something, I should judge it was one of the big oil hose of the tank that caught me in the back about a little above my ribs and about my hips and it rolled me." (T. 67-68.)

The above testimony follows close upon the testimony quoted toward the top of page 5 of the Company's Brief.

"Q. As I understand it you were coming back to the shanty simply to wait for that purpose until another engine came along?"

A. Yes sir." (T. 114.)

The two photographs and the map opposite page 280, 284 respectively of the transcript, assist materially in illustrating and explaining this testimony.

When Gray got to his rest room just after being injured, his assistant was there resting. There were no engines to be hostled or other work to be done then. His assistant had been in the rest room doing nothing for about 2 hours (T. 50.) Neither Gray nor any one else had hostled any engines during this time. (T. 81, 109.)

There is not a scintilla of evidence that the next engine which Gray expected to hostile, if he had not been injured, was an engine used in interstate commerce.

In fact, the next engine that was hostled was the engine that struck Gray and that engine was hostled by his assistant. (T. 53.)

Gray did not even know at the time he was injured that the engine which struck him was in the yards to be hostled. (T. 93, 97-98.)

There is not a scintilla of evidence in the record that Gray ever hostled an interstate engine after he was injured. So far as the record shows, all of the interstate commerce engines might have been hostled by Gray's assistant or they might have been hostled by the hostler and his assistant on duty at night.

There is not a scintilla of evidence that this engine had ever been or would ever be engaged in interstate commerce.

On the other hand it does appear affirmatively that this engine, which struck Gray, arrived at the yards at Antigo, Wisconsin, that morning, after being driven from either Fond du Lac or Green Bay (T. 26, 220.), both of which are in the same state.

There is not a scintilla of evidence that Gray had hostled an interstate commerce engine on that morning previous to his injury or at any other time.

On the other hand, there is affirmative testimony to the effect that all of the engines which Gray hostled previous to his injury on that morning, came to the yards in Antigo from other places in the same state. (T. 59, 65.)

There is no unambiguous, positive evidence in the record that this cinder pit or this cinder pit track was at the time of the injury, had been, would be or has been since used in interstate commerce by actually running engines over it or otherwise.

Referring to the map opposite page 284 of the transcript, it appears that this cinder pit track is one mere sidetrack among a large number of side tracks.

There is no unambiguous, positive evidence in the record that any of the engines which passed over this cinder pit or cinder pit track had been, was being, would be or has been used in interstate commerce.

So far as the evidence shows, all of the interstate commerce engines might have been taken into the round house from the south over the other track just east of the sand house, etc., or they might have been taken into the round house from the north over the two tracks which lead into the round house from that direction; and so far as the evidence shows, all of the interstate commerce engines might have been hostled in the round house or at some other point in the yards in question or at some other yards.

It does appear affirmatively that Antigo and the Antigo yards are on the Ashland Division of the Company's Railway Lines and that all of the cities and villages enumerated as being on this division are in the state of Wisconsin and that the foreman of the Antigo round house is subordinate to the foreman of this division. (T. 156, 166, 175.)

Gray was not upon a train or any part thereof passing between two states at the time of the injury, nor running an engine or train between two states. He was not upon a railway track connecting two states or extending between two states. He was not upon a railway track over which trains or cars containing interstate commerce were ever hauled in passing between two states. He was walking along beside a side track that did not ex-

tend between two states and over which interstate commerce was not hauled between two states. He had not come from operating a car or engine engaged in interstate commerce. He had no particular engine or car in mind that he expected to take charge of or operate, much less a particular engine or car actually engaged in interstate commerce. His duty never required him to haul commerce between two states or to run an engine in passing between two states. He was an engine *hostler*. His duty required him merely to take charge of engines after their runs had been completed for the purpose of driving or operating them between the cinder pit and the round house while the ashes were being emptied from them and while coal, wood and water were being put in them. When these things were done, he delivered them at the round house, not for the purpose of having them used immediately in hauling interstate commerce or any other commerce, but for the purpose of having them remain there, to be cooled off, wiped, repaired, etc., before they were taken out to haul any kind of commerce. At the time he was injured he was not even doing these things. He was simply proceeding to his customary waiting place to await further instructions from his superiors, or those who might call upon him to perform any of his duties. It was not shown that if he had gotten to his waiting place in safety he would have been called upon to dispatch, in the usual way, Kane's engine or any particular engine that might have been engaged in interstate commerce. If he had gotten to his waiting place safely he might have been called to the round house to perform some duty that had to do only with intrastate commerce, or that had nothing to do with any kind of com-

merce. Rock, his assistant, did have entire charge of the dispatching of Kane's engine. It was immaterial to plaintiff for the purpose of performing his duty as to whether any engine had ever engaged in interstate commerce or was ever to engage in interstate commerce. The question of interstate commerce had no bearing upon and no substantial relation to his duty, or to the manner in which he performed it.

There was no allegation of interstate commerce in the complaint. (T. 11-15.)

Neither was there any allegation of interstate commerce in the Company's answer (T. 15-18). The answer is verified by the learned counsel for the Company under oath. (T. 18-19.)

It is apparent that the learned counsel for the Company did not have sufficient basis of fact after an investigation, to assert by way of allegation under oath that facts existed which would bring the case within the purview of the Federal Statute because of the existence of interstate commerce.

On the other hand, the Company in its answer alleged affirmatively by way of defense that the plaintiff had failed to commence his action or give a notice of injury as required by the Wisconsin Statutes (T. 18.), thereby indicating the conviction on the part of the Company and its learned counsel that interstate commerce was not in any way involved.

This was the state of the record when counsel for the Company offered, as heretofore pointed out and set forth, the testimony pertaining to interstate commerce which was stricken out and this brings us to the question as to whether there was error in the decision of the supreme court of Wisconsin in

affirming the decision of the trial court in so far as that decision eliminated this testimony.

There was no dispute in or about the testimony which was offered, received subject to objection, and finally rejected, and the only element of proof added by the offer is that the Company was at the time an interstate railroad; it merely mentions in a general and rather ambiguous way the hostling of engines "*near*" and "*at this round house.*" (T. 236-238.)

Application of Law to Facts.

THE STRIKING OUT OF THE TESTIMONY INVOLVED MERELY A FINDING OF FACT ON UNDISPUTED EVIDENCE, WHICH THIS COURT WILL NOT REVIEW OR DISTURB.

As heretofore pointed out, since all of the evidence in any way pertaining to interstate commerce, including the part rejected, is *undisputed*, *any finding of fact* with reference to the same, *was for the court and not for the jury* (ante p. 18); in striking out the testimony after it was received subject to objection, the court, *in effect*, at least, made a *mere finding of fact* to the effect that the rejected evidence, considered with the other undisputed evidence on this question, was not sufficient to establish that Gray at the time of his injury was engaged in a *task* of interstate commerce; *and this Court upon a writ of error will not review or disturb such finding of fact* (ante p. 18).

REASONING OF SUPREME COURT OF WISCONSIN.

In holding that the trial court committed no error in ultimately striking out the testimony which was offered by the Company, the Supreme Court of Wisconsin said: (Italics are the author's.)

The complaint does not allege that the defendant was engaged in interstate commerce or that the engine in question had been handling an interstate train, but simply that the defendant was operating trains and was carrying passengers and freight for hire between Antigo and other cities and villages in Wisconsin; neither did the plaintiff's evidence show that the defendant was transacting an interstate business. When the defendant took the case, however, it offered to show that it and its trains, engines and employees were engaged in hauling cars of freight continuously over this line between points in Illinois, Michigan and Wisconsin at and prior to the time of the accident; that the engines which were being dispatched at this round house at the time in question were making trips through Michigan to Ashland, making connections with the Watersmeet branch; that the engines running south wouldn't run outside the state; that those going and coming from the south handled refrigerator cars from Chicago. No offer was made to show that the engine in question had been hauling an interstate train or interstate freight, nor that all the engines dispatched at this round house hauled interstate freight or interstate trains. Part of this testimony was received against objection, but ultimately it was all stricken out, and so the question whether the federal employers' liability act controlled the present case was eliminated from the case.

An attempt is made by the respondent to justify this ruling on the ground that the testimony was incompetent and immaterial because there is no claim made in the answer that the plaintiff was employed in interstate commerce at the time of his injury. We should be slow to hold to so strict and technical a rule. The statutes of the United States are the law of the land, and not like

the statutes of our sister states which must be pleaded and proven in order to be available. Furthermore, the fact that the great railroad systems of the state are continuously engaged in both kinds of commerce must, we think, be so well known as to be matter of common knowledge. *We do not find it necessary to decide this question, however, as we are of opinion that the ruling was right on the merits.* As it was pointed out in recent case of *Ruck v. C. M. & St. P. Ry. Co.* (present term, 140 N. W. Rep., 1074), *it is necessary in order to bring a case within the federal act not only that the employer be engaged in interstate commerce, but that the injured employee shall suffer his injury "while he is employed" in interstate commerce.* Taking care of an engine after it has completed its run and preparing it for the round house seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply repairing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce. *Ruck v. C. M. & St. P. Ry. Co.* (supra).

We think there is a stronger ground, however, upon which the ruling of the trial court may be sustained. It appears that the plaintiff at the time of the accident here was walking back to his rest shanty, and was doing nothing at all in the way of dispatching engines. Now it may perhaps be correctly held (though we do not decide the question) that a man whose day is spent in dispatching engines all of which are engaged in interstate commerce is in legal effect employed in interstate during the whole day and including the periods of leisure or rest when he is doing nothing but waiting for the arrival of an engine; but if, on the other hand, part of the engines dispatched be engaged in interstate

business and part in local or intrastate business, we are unable to see how it could be logically said that he was "employed in interstate commerce" all day or during his intervals of leisure. In the present case, as we have seen, there was no offer to show that all the engines dispatched daily by the plaintiff were engaged in interstate commerce. As said before in this opinion, we think it must be considered a matter of common knowledge that the great railroad systems of the present day are engaged in both interstate and intrastate commerce all the time and side by side. The offer of proof in this case went little, if any, further than this. It was noticeably guarded and indefinite in its purport; every word of it might be admitted to be true and yet it would not be shown that all the engines dispatched at this round house by the plaintiff were engaged in interstate business, nor even that the engine in question had been so engaged. The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish the fact that the plaintiff's entire work consisted of the dispatching of engines engaged in interstate commerce. Error must appear affirmatively, it is not to be presumed" (T. 290-292).

It appears that the supreme court of Wisconsin held that in order to bring an employee within the purview of the Federal Employers' Liability Act, two things are essential:—

1st—The Railroad Company must "be engaged in interstate commerce" generally at the time of the plaintiff's injury.

2nd—"The injured employee shall suffer his injury 'while he is employed' in interstate commerce."

The *necessity* of this second requisite, in addition to the first, is *apparently* what the trial court had in mind in assigning its reason for striking out the testimony in question. (T. 236-237; C. B. 7.)

CASES RELIED ON.

That these two requisites must be present to bring a case within the provisions of this federal act is well settled by a decision of this court.

Ill. Cent. R. R. v. Behrens, 233 U. S., 473 at 478.

It is also apparent that the supreme court of Wisconsin held that the evidence offered by the Company, received subject to objection and finally rejected, merely established that the first requisite of the federal act was satisfied in the case at bar; and that the second requisite of the federal act was not satisfied by the evidence offered and rejected taken together with all of the evidence that was received.

From the *Behrens* case and the decision of the Supreme Court of Wisconsin in the case at bar, we readily derive the rule that if either of these two requisites are wanting, the Federal act has no application and its provisions become wholly immaterial and the only question before the court upon this branch of the argument is whether either of these two requisites are wanting in the case at bar under all of the proof, including the part rejected.

We respectfully submit that both of these cases are identical in principle and analogous in fact and that the decision of this court in the *Behrens* case rules the case at bar.

We quote from the decision in the *Behrens* case as follows: (*Italics* are the author's.)

"The facts shown in the certificate are these: The intestate was in the service of the railroad company as a member of a crew attached to a switch engine *operated exclusively within the City of New Orleans*. He was the *fireman* and came to his death, while at his *post of duty*, through a head-on collision. The general work of the crew consisted in moving cars from one point to another within the city *over the Company's tracks* and other *connecting tracks*. Sometimes the cars were loaded, at other times empty, and at still other times some were loaded and others empty. When loaded the freight in them was at times destined from within to without the State or vice versa, at other times was moving only between points within the State, and at still other times was of both classes. When the cars were empty the purpose was usually to take them where they were to be loaded or away from where they had been unloaded. And oftentimes, following the movement of cars, loaded or empty, to a given point, other cars were gathered up and taken or started elsewhere. *In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other*. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the State. The question of law upon which the Circuit Court of Appeals desires instruction is, whether upon these facts it can be said that the intestate at the time of his fatal injury was employed in interstate commerce within the meaning of the Employers' Liability Act. * * *

We entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its *general* work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce. * * *

Passing from the question of *power* to that of its *exercise*, we find that the controlling provision in the act of April 22, 1908, reads as follows: 'Section 1. That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' Giving to the words '*suffering injury while he is employed by such carrier in such commerce*' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce. * * *

The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? (Citing the *Pedersen*, *Seale* and *Zachary* cases relied upon in the company's brief.) * * *

Here, at the time of the fatal injury the interstate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a

service is interstate commerce, and as the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury." (215 U. S., 575 et 576-8.)

As stated by this court that *Bellows* "expected upon the completion of that task to engage in another which would have been a part of interstate commerce is immaterial."²

Likewise, if it were shown that Gray expected upon the completion of the thing that he was doing to engage in a task which would have been a part of interstate commerce, it would be immaterial.

Upon the question as to whether the second requisite of the Federal Act is satisfied in the case at bar; but the case at bar is even more favorable to Gray than the *Bellows* case because in the case at bar there is no proof or offer of proof whatever that Gray expected, then or thereafter, to engage in any task which would have been a part of interstate commerce.

We quote from *La Cume v. E. O. F. & B. E. Co.*, 64 So. (La.), 332, upon another similar case, squarely in point as follows:

"He was employed by the defendant company as its coal house at Eunice, La. His functions consisted in receiving the incoming cars that came to the coal house, taking care of them, and loading them filled with coals and stacked up, ready for use, when called for. While he was stacking up an oil burning locomotive, the coals which rested in the place, or part, directly above the fire,

supervising it from the engine to the tender; goes over, to examine if the machinery performs all the work, and a sort of inspection is called, by which the fire men are kept from their stoves and blowers, and sent to stoke the fire and maintain water, and so forth. &c &c

But we do not agree with Mr. Nathan that the case here was under the Federal statute. For showing that it was, Mr. Nathan relies exclusively upon the following testimony:

"Q. Where did this engine run? A. It worked all the way between Houston and New Orleans. It was out of the Quincy shop once. The Quincy is a Louisiana name. Yet the testimony of this witness is more or less that this locomotive, the one which locomotive of the defendant company, at one of the runs, might be out and not returning and be interstate commerce. That that it was being so used at the time the steamer was at sailing to it. On the contrary, the witness shows that he has run, with some of his passengers, that have come from certain intermediate points to Houston. If the fact that a locomotive is at one night to come the next day, or whenever may matter, is interstate commerce, even equivalent to being actually at the time it was in that commerce, the effect would be that whenever a railroad has any engine sent to interstate commerce, that engine, like to interstate commerce, never one of its employees would at all times be interstate commerce when it left work."

In the *Stevens* case I am disposed to regard the Federal authorities, in support of the contention that the facts brought the case within the purview of the Federal act, that:

"The general nature of the employment and not any specific subject item of work must

fix the status of an employe." 233 U. S., 473 at 474.

But this court overruled this contention and held that

"it is clear that Congress *intended* to confine its action to injuries occurring when *the particular service* in which the employe is engaged is a part of interstate commerce." (233 U. S., 473 at 478.)

In the first place Gray was not performing any *service*. He was not even engaged in *carrying* an article of any kind.

In the second place *the particular* thing which he was doing was "*walking back*" to his rest room to await the arrival of an engine to be hostled or the performance of some other work to be done, not knowing what it would be.

If, as held in the *Behrens* case, it was *immaterial* what *Behrens* expected to do after the completion of the thing that he was doing, then it logically follows that it was likewise *immaterial* what *Behrens* had been doing just before he commenced to do the thing that he was doing at the time of his injury. This court so held in deciding that it was *immaterial* that *Behrens* had been indiscriminately handling interstate commerce previous to his injury. That this is the law has also been held in another well reasoned decision, squarely in point citing the *Behrens* case,

Shanks v. D. L. & W. R. Co., 148 N. Y. Supplement (Supt. Ct.) 1034.

We quote from pp. 1035-56 of this decision as follows: (Italics are the author's.)

"Plaintiff had *previously worked repairing parts of locomotives*, but at this time, and on the day before, he had been assigned to the wheelwright work of attending to the shop machines and of keeping them in repair * * * *

Repairs at these shops were on any locomotives indiscriminately, regardless of whether they ran in interstate or intrastate traffic. The remedy by the federal statute is "to any person suffering injury while he is employed by such carrier in such commerce." These strict limitations are so as not to trench on the rights of the states. Congress can legislate concerning the mutual rights and liabilities of master and servant, when both are actually engaged in interstate commerce. Emp. Liability Cases, 207 U. S., 463, 28 Sup. Ct., 141; 52 L. Ed., 297.

The employe must be himself engaged in commerce, or his work must be a part of interstate commerce under federal protection, but *this is not his general line of work, but "the particular service in which the employe is then engaged."* The test declared by the Supreme Court of the United States is the "nature of the work being done at the time of the injury," not what the employe expects to do after the completion of his task. * * * *

How carefully the courts *discriminate* is seen as to the crew of a switch engine, which sometimes moves local cars, and again cars carrying freight for points beyond the State; the men working *indiscriminately* on both kinds of traffic. But these employes are not thereby held to be engaged in interstate commerce; on the contrary, such switching train work, though in constant change, is to be distinguished according to its character at the *time* of the employe's injury, and the liabilities by the federal act are applied only to the handling and movement of cars that are then

bound to or from across state lines. *Illinois Central R. R. Co. v. Behrens, supra.*"

The supreme court of Wisconsin held in this respect and its holding is sustained by the undisputed evidence as follows:

"We think there is a stronger ground, however, upon which the ruling of the trial court may be sustained. It appears that the plaintiff at the time of the accident here was walking back to his rest shanty and was doing nothing at all in the way of dispatching engines." (T. 291.)

As heretofore pointed out, the evidence shows that Gray at the time of his injury was "*walking back*" to his rest room, there to await the arrival of an engine to be dispatched or the performance of some other duty without showing that such engine would be an interstate commerce engine or that such other duty would be a part of interstate commerce. His chief purpose and his primary object and his dominant idea were to get back to his rest room, there to remain at leisure and it may be for considerable time before any duty presented itself and without knowing just what duty would present itself or when it would present itself. From the moment that he turned his back upon the cinder pit man at the cinder pit to go back to his rest room and all of the way back, he was concerned with, absorbed in and engaged at "*walking back*" as found and decided by the supreme court of Wisconsin.

Since it is immaterial what he was doing before he started "*walking back*" it is immaterial that before he started to "*walk back*" he stood for a moment, glanced at and looked at the cinder pit

man at the cinder pit. The moment he turned his back upon the cinder pit man as he did and turned his face in the direction of the rest room, he wholly ceased to be engaged in looking at or glancing at the cinder pit man. The cinder pit man went completely out of his mind, because his mind then became engaged with "*walking back*" along the coal shed, between the coal shed and the track and in *gauging* his way as he went. The cinder pit man and his activity were no longer even within the range of Gray's vision because his vision was then obscured by the steam, smoke and gas.

Gray had in fact been "*walking back*," *gauging* his way to a point nearly 70 feet from the cinder pit man at the time that Gray was injured (T. 95.) and he had then completely severed all connections with the cinder pit man and had wholly completed the act of looking or glancing at the cinder pit man, and had commenced a wholly new act or task which was that of "*walking back*," *gauging* his way as he went to his rest room, with a view to ultimately giving his attention, thought and energy to the dispatching of an engine or the doing of some other task.

In the Behrens case it was held that the fact that Behrens had previous to the time of his injury been engaged in handling interstate commerce indiscriminately was immaterial, notwithstanding the fact that at the very moment that Behrens was injured he was actually upon and engaged in handling, as a locomotive fireman, an instrumentality of interstate commerce in the form of a locomotive engine which had been and would be as it appeared affirmatively from the evidence in the Behrens case, engaged "indiscriminately" in hauling cars with interstate freight, and notwithstanding the fact that it must

be inferred, at least from a reading of the Behrens case, that Behrens as fireman was at the moment of his injury engaged in maintaining the efficiency of this instrumentality of interstate commerce which had been and was about to be used in hauling interstate cars by maintaining the fire, keeping up the steam, observing and guarding the engine and doing the other things that are ordinarily required to be done in maintaining a locomotive engine at a point of at least reasonable efficiency to the end that it may be used in the hauling of freight which freight, in the Behrens case, was interstate freight.

Certain it is that in addition to holding that the Railway Company must be engaged in interstate commerce and that the employee must be so engaged at the time of his injury, the Behrens case holds squarely that it must appear affirmatively and clearly where the evidence is undisputed, that the employee was engaged in interstate commerce at the time of his injury and that it is wholly immaterial whether he had been so engaged previously or whether he was expected to be so engaged immediately afterwards, or whether he was then upon an instrumentality of interstate commerce assisting in the handling of it and in the yards of an interstate commerce Railway Company.

This reasoning, all of which is sustained by the doctrine of the Behrens case, we respectfully submit disposes completely of what the learned counsel in his brief terms "the second aspect of Gray's employment." (C. B. 12.)

But there is another view of this so-called "second aspect of Gray's employment" which the learned counsel for the company seems to have overlooked. As heretofore pointed out, it is not affirmatively or clearly shown in the evidence, including that which

was rejected, that the side track which passed over the cinder pit had actually been, was or would be used in interstate commerce by having interstate engines or cars or traffic pass over it, or that the cinder pit had been, was or would be used in interstate commerce or that the cinder pit man had been, was or would be engaged in performing a duty of interstate commerce, or that the act of the cinder pit man in throwing the water to wet down the cinders as Gray looked or glanced at him momentarily, was an act of interstate commerce.

There is not a scintilla of evidence in the record admitted or rejected which shows that any specific engine, tender, car or employe had actually been or actually was or actually would be engaged in any specific act of interstate commerce. The burden of proof in this respect rested wholly upon the Railway Company and we respectfully submit that the Company has utterly failed to establish the affirmative of its contention in this respect.

This is the very thing which prompted the supreme court of Wisconsin speaking by its Chief justice to say as it did say in reference to the failure of the company's proof in this respect with some manifestation of criticism the following:

"It was noticeably guarded and indefinite in its purport; every word of it might be admitted to be true and yet it would not be shown that all the engines dispatched at this round house by the plaintiff were engaged in interstate commerce, nor even that the engine in question had been so engaged." (T. 291.)

Therefore, we respectfully submit the decision of the supreme court of Wisconsin in so far as it held, as heretofore pointed out, that the evidence

rejected, taken together with the evidence received, did not establish affirmatively, clearly or otherwise that Gray at the time of his injury was engaged in doing a thing or an act or a task that was a part of interstate commerce sufficiently to satisfy the second requisite of the Federal Act within the doctrine of the Behrens case.

"But, of course, it (the power over interstate commerce conferred on Congress by Article 1, Sec. 1, Clauses 3 and 18 of the United States Constitution) does not extend to any matter or thing which does not have a *real or substantial* relation to some part of such commerce."

Second Employers' Liability cases, 223 U. S., 1.

Again on the same page of this case the Supreme Court of the United States has said that this power of Congress is subject

"to the qualification that the particulars in which those relations are regulated must have a *real or substantial* connection with the interstate commerce in which the carriers or their employees are engaged."

We submit that Gray was not shown to be connected in any way with interstate commerce at the time of his injury under the most favorable view that can be taken of the facts from the standpoint of the company.

The Supreme Court of the United States in *Howard v. Ill. Central R. Co.*, 207 U. S., 463, at 498, in the decision holding the first Federal Railway Employers' Liability Act unconstitutional speaking by Chief Justice White, said:

"Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such

carrier may, in the nature of things, also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exhausted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again, the same road having shops for repairs, and, it may be for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest besides, the possibility of its being engaged in other independent enterprises."

The learned Counsel for the Railway Company must concede now that the Behrens case is in point because in the Company's brief filed in the Supreme Court of Wisconsin in the case at bar as appears from a reference to the official report of the case 153 Wisconsin 637 at 643, he cited *Behrens v. Ill. Cent. R. Co.*, 192 Federal, 581, and relied upon it and this is the report of the decision of the Behrens case made by the United States District Court (E. D. La.) wherein it was held that Behrens was within both of the requirements of the Federal Act and an examination of this decision of the District Court will show that the facts as reported in the decision are substantially the same as the facts stated in the certificate of the Circuit Court of Appeals certifying the Behrens case up to this Court for decision.

And it is most significant that counsel for the Railway Company, in his brief, passes by with an obscure reference, near the very end of his brief

(C. B. 15.), the *Behrens* decision, which is this court's most recent reported decision construing the Federal Act in its application to the case at bar, and in which the decision of the District Court is reversed, especially since he considered the case sufficiently close in point to justify his citation of the decision of the District Court and his reliance upon it in this case in the Supreme Court of Wisconsin.

Furthermore, the decision of this Court in the *Behrens* case is cited in the Railway Company's Brief in such a way that the casual reader, at least, might get the impression that the decision of this Court in the *Behrens* case supports the Company's contention, *while it squarely overrules its contention.*

It is interesting to note, too, that in the brief filed by the learned counsel for the Railway Company in this Court, the case of *Ruck v. C. M. & St. Paul Ry. Co.*, 153 Wis., 158, is assailed (C. B. 15.); he also cited and relied upon this *Ruck* case in the Supreme Court of Wisconsin in the case at bar as appears from a reference to 153 Wis., 637 at 643.

Furthermore, in his brief counsel for the Company puts emphasis upon the reference to the *Ruck* case made by the Supreme Court of Wisconsin in its decision of the case at bar (C. B. 9.) but an examination of the decision of the Supreme Court of Wisconsin in the case at bar discloses that it did not rest this decision upon the decision of the *Ruck* case and that what was said about the *Ruck* case is mere *dicta*.

Immediately after referring to the *Ruck* case the Supreme Court of Wisconsin proceeds to say:

"We think there is a stronger ground, however, upon which the ruling of the trial Court

may be sustained. It appears that the plaintiff at the time of the accident here was "walking back" to his rest shanty and was doing nothing at all in the way of dispatching engines." (T. 291.)

A little further on in the decision the Supreme Court of Wisconsin in referring to the Company's testimony which was stricken out goes on to say:

"As said before in this opinion we think it must be considered a matter of common knowledge that the great railroad systems of the present day are engaged in both interstate and intrastate commerce all the time and side by side. The offer of proof in this case went little if any further than this." (T. 291.)

An examination of the testimony which was offered and rejected and which has heretofore been set forth fully (ante p. 6) will disclose that the holding of the Wisconsin Supreme Court in this respect and to the effect that the rejected testimony satisfied only the first requisite of the Federal Act, is correct.

Since only the first requisite of the Federal Act was satisfied by the rejected testimony and since the second requisite of the Federal Act was not satisfied by the rejected testimony considered in connection with the admitted testimony, the rejection of this testimony is wholly immaterial and harmless and without error.

An examination of the brief of counsel for the Company makes it apparent that these two wholly distinct requisites have been confused and that this rejected evidence which goes only to the first requisite has been confused with the requirements of

the proof necessary to establish the existence of the second requisite.

In his brief counsel for the Company argues that the State Courts including the Wisconsin Supreme Court "were groping around trying to find the light" at the time the case at bar was decided by the Wisconsin Supreme Court. This charge is not sustained. The Supreme Court of Wisconsin previous to this time had exhibited a high order of discrimination in construing the Federal Act.

Rowlands v. C. & N. W. Ry. Co., 149 Wis., 51; 135 N. W. 156.

The Wisconsin Court showed commendable discrimination in the case at bar in reaching the same result which this Court reached in the analogous Behrens case, notwithstanding an erroneous decision of the District Court.

The Wisconsin Supreme Court has shown similar discrimination in the case of *Graber v. D. S. S. & A. R.*, 150 N. W. (Wis.), 489, (Adv. R. Feb. 5, 1915), without impairing in any way the force of its decision in the case at bar.

It is likewise commendable that the Supreme Court passed over without decision the question of pleading raised in the case at bar and decided it upon broader grounds.

What the Wisconsin Supreme Court said to the effect that the proof offered and rejected should have tended to establish that Gray's entire work consisted of dispatching interstate commerce engines, (T. 291.) was unnecessary to the decision of the case and is therefore dicta; it is sufficient to sustain the decision under the doctrine of the Behrens case that the rejected testimony fails to

establish that Gray was engaged in a task of interstate commerce at the time of his injury.

Other cases illustrative of the limitations of the scope of the Federal Act which by analogy of principle support the contention that there was no error in rejecting the testimony offered by the Company because by it and all other evidence Gray was not shown to be employed in interstate commerce at the time of his injury are:

Connole v. N. & N. Ry. Co., 216 Fed., 823.
(Citing Behrens Case.)

Thomas v. B. & M. R. R., 218 Fed., 143.
(Citing Behrens Case.)

Bravis v. C. M. & St. P. Ry. Co., 217 Fed., 234. (C. C. A.)

Nordgard v. M. & N. Ry. Co., 211 Fed., 721.

Jackson v. C. M. & St. P. Ry. Co., 210 Fed., 495.

Fenster v. F. & R. Ry. Co., 197 Fed., 589.

Heibach v. Lehigh Valley R. Co., 197 Fed., 579.

Van Brimmer v. T. & P. Ry. Co., 190 Fed., 394.

Tamura v. G. N. Ry. Co., 108 Pac. (Wash.), 774.

Purson v. N. Y. R. & W. R. Co., 85 Atl. (N. J. E. & A.), 233.

Wright v. C. R. I. & P. R. Co., 143 N. W. (Neb.), 220.

Meyers v. N. & W. Ry. Co., 78 S. E. (N. C.), 280.

E. E. Co. v. Murphy, 70 E. E. (Ct.), 375.

G. E. & S. A. Ry. Co. v. Chapman, 155 E. W. (Texas C. A.), 1115.

Louisville & N. E. Co. v. Strong's heirs, 242 E. W. (E. C. A.), 224.

Town v. C. E. & S. P. Ry. Co., 177 E. W. (E. C. C. A.), 625.

H. E. & F. Ry. Co. of T. v. Fossier, 138 E. W. (Texas C. A.), 211.

CASES BASED ON OR CONTAINING SOME DIRECT EVIDENCE.

An examination of all of the cases mentioned by counsel for the company except the *Bellevue* case will disclose that they are readily distinguishable from the case at bar. They can be classified into 3 groups. The first is the group of repair cases.

In each of the cases in this first group is sufficient affirmative proof that the railway company was an interstate railway engaged in interstate commerce, there was affirmative proof that the employee was actually engaged at the very moment of the injury in a specific act of repairing a specific instrumentality, or specific instrumentalities which actually had been and would be used in interstate commerce, or which actually were being used in such commerce. This is the largest group, and these cases are as follows:

Bellevue case, 230 U. S., 145. (Ct. E. 15.)

Barton v. Litchfield Railway Company, 148 N. E. Supp., 1225. (Ct. E. 15.)

San Pedro Railway Co. v. Smith, 218 Pac., 373. (Ct. C. A.) (Ct. E. 15.)

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1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 2684-2685, 2686-2687, 2688-2689, 2690-2691, 2692-2693, 26

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The case of *Ruck v. C. M. & St. P. Ry. Co.*, 153 Wis., 158 (C. B. 15.) like the *Behrens* case holds against the contentions of counsel for the company; and if we were to concede for the sake of the argument that the decision is incorrect (a very debatable question at best) such concession would not reach the case at bar. It would merely classify the *Ruck* case with the *Pederson* and other *repair* cases; and as has been shown this court has already distinguished the *Pederson* case from the *Behrens* case and in other cases including nearly all of those relied on in this brief it is distinguished from other cases analogous in fact as well as principle to the case at bar.

In each of the cases in this second group, *in addition* to affirmative proof that the railway company was an interstate railway, engaged in interstate commerce, there was *affirmative* clear and conclusive proof that the *employee* was actually engaged at the very moment of his injury in preparing in a *specific* way, a *specific* instrumentality for immediate use in carrying traffic, on a *specific* trip, between *specific* points in different states. These cases are:

St. Louis, San Francisco & T. Ry. Co. v. Scale, 229 U. S., 248. (C. B. 13-14.)

Montgomery Southern Pacific Railway Company, 131 Pac., 507. (C. B. 12.)

I. C. R. Co. v. Nelson, 203 Fed., 951. (C. C. A.) (C. B. 13.)

Armbruster Case, 147 N. W., 338. (C. B. 15.)

Freeman, Receiver, v. Powell, 144 S. W., 1033. (C. B. 15.)

In each of the cases in the third group, *in addition* to affirmative proof that the railway company was an interstate railway, engaged in interstate commerce, there was affirmative proof that the *employee*, at the very moment of his injury, was in the act of doing and about to do a specific *task* having an *immediate* and a *real* and *substantial* relation to interstate commerce and calling for the *use* of a *specific instrumentality* of such commerce. These cases are:

Zachary Case, 232 U. S., 248. (C. B. 13, 15.)

Lamphere Case, 196 Fed., 336. (C. B. 13.)

Rentz Case, 162 S. W., 959. (C. B. 13.)

St. Louis & Southwestern Railway Company v. Brothers, 165 S. W., 488. (C. B. 13.)

Graber v. Duluth, South Shore & Atlantic Ry., 150 N. W., 489. (C. B. 15.)

Horton v. Oregon Navigation Co., 130 Pac., 897. (C. B. 16.)

Most of these cases in each and all these three groups are based on the Pedersen case.

Pedersen was *carrying* a sack of bolts about to be used immediately in the *repair* of an interstate track; Gray was *carrying* nothing and doing no work.

It is interesting to note that each of these three groups of cases relied on by counsel for the company is headed by one of the only other three cases, including the *Pedersen* case, involving the scope of the act, decided by this court, that all of these cases were decided previous to the *Behrens* case and

considered in the *Behrens* decision and that this court in the *Behrens* case distinguished them from the *Behrens* case.

It is respectfully submitted that the facts in the case at bar including those rejected do not answer the requirements of the doctrine of any of these three groups in respect to the second requirement of the Federal act.

Since the Federal act is in derogation of the common law it should be strictly construed.

St. L. I. M. & S. Ry. Co. v. Conley, 187 Fed., 949, at 952.

Fulgham v. M. V. R. Co., 167 Fed., 660.

Furthermore, there is no mischief to be remedied, as suggested in the *Conley* case, by the application of the Federal act to the case at bar as the result as heretofore pointed out must be the same under either act.

The Supreme Court of Wisconsin did not err in affirming the rejection, by the trial court, of the testimony offered by the company.

4th. It is sufficiently apparent that the writ of error was sued out merely for delay to warrant this court in awarding Gray damages.

This branch of the argument is predicated, in part, upon the soundness of the argument advanced in either or all of the branches of the argument heretofore advanced.

Additional Facts.

In addition it is desired to point out that the company apparently did not have sufficient confidence in the contention that Gray was engaged

in interstate commerce at the time of his injury within the meaning of the Federal Act to warrant setting forth an allegation to this effect in its answer under oath, made after an investigation of the facts, as the essentials of good form, at least in pleading, required; that, the answer, on the contrary, contains an express allegation designed to bring the case within the Statute of Limitations of the State, thereby, by implication at least, conceding the applicability of the State statute to the exclusion of the Federal Act (T. 16-19); that the company's contention in this respect was not advanced until near the very end of the trial (T. 236); that the contention when advanced, was supported by an offer of proof that was, as found by the Supreme Court of Wisconsin, "*noticeably guarded and indefinite in its purport;*" that the company's contention in this respect is not presented in the assignment of errors here in the way that it was presented in the State Courts (T. 2-3, 289); that the specification of errors in the company's brief does not quote the full substance of the evidence (Company's Brief pp. 10-11), the rejection of which must be relied on in support of the company's contention in this respect as required by Rule 21 of this court; that some of the company's assignments of error in this court (T. 2-3) are wholly abandoned in the company's brief. (Company's Brief 10-11); that a lengthy delay has actually ensued; that nearly two years have elapsed since the decision of the Supreme Court of Wisconsin (T. 286); that considerably more than four years shall have elapsed from the date of Gray's injury (T. 64) to the time of the collection of his judgment; and that Gray's injuries are of a most serious and permanent character.

With respect to the seriousness and permanency of his injuries, the Supreme Court of Wisconsin found as follows:

*"IV. It appears from the evidence that the plaintiff received severe bruises, wounds and contusions on the head, body and hips at the time of the accident, that several ribs were broken and that he was in bed two weeks; that his left arm is still partially paralyzed, that he suffers pain in the left arm and shoulder practically all the time, that he is incapacitated for physical labor, is afflicted with occasional spells of dizziness, and that his average weight is reduced from about 160 pounds to about 130 pounds. The injury was suffered in January, 1911; he was examined by Doctor Connell of Fond du Lac in May, 1912, and it was then found for the first time by examination of his sputum that he had incipient consumption or tuberculosis of the lungs. He testified himself that he had had night sweats and hemorrhages. * * * **

*There was medical testimony to the effect that an injury such as plaintiff received is likely to induce or incite tuberculosis by reducing the natural resistance of the patient, lowering his vitality and putting him in a condition whereby he is unable to withstand infection. * * * **

In the present case, however, there was other testimony besides the general testimony above referred to. Dr. E. J. Donohue, who treated the plaintiff for his injuries from the day of the accident in January, 1911, until some time in April following, and gave him a thorough physical examination, including an examination of the sputum, about two weeks before the trial in July, 1912, testified directly as follows: He testified positively that in his opinion the tubercular condition was the result of the injury re-

ceived. We are unable to say that this testimony is beyond the proper scope of expert medical testimony, and unless we can say that, it seems certain that we cannot hold that a finding that the tuberculosis condition was caused by the accident is purely conjectural." (T. 292-3.)

The findings of the Supreme Court of Wisconsin in this respect are amply sustained by the proof (68-78, 114-138, 143-144, 152-3), and the correctness of this proof was conceded by the company, the concession being manifested by the failure of the company to offer any proof whatever in rebuttal.

Because of the seriousness and permanency of Gray's injuries, resulting in the destruction of his earning capacity, the delay caused by the Writ of Error in the case at bar has worked an unusual hardship upon Gray.

Application of Law to Facts.

It is respectfully submitted that if damages are awarded, they should be in the full amount as specified by the rule of this court and the authority of the statute.

RULE 23—Revised Statutes Sect. 1010.

These damages may be awarded whether the writ of error be dismissed or the judgment be affirmed.

Deming v. Carlisle, 226 U. S., 102.

Summary.

To summarize, it has been pointed out:
1st—That this court has no jurisdiction,

(A) Because the court has not acquired jurisdiction if the deputy clerk, who signed and issued the writ, has not been clothed by Congress with authority to sign or issue a writ of error from this court to a state-court, and such defect is not susceptible of amendment, and

(B) Because the Federal question in this case is not sufficiently necessary, controlling and material to the decision of the case to render it sufficiently devoid of frivolousness to sustain jurisdiction;

2nd—That if this court does entertain jurisdiction, it is not sufficiently clear that the error complained of (if error), the error being assumed without being conceded solely for the purpose of argument, has worked prejudice to the substantial rights of the company to such an extent as will require reversal;

3rd—*That, contrary to this assumption, thus indulged in solely for the purposes of the argument, the Supreme Court of Wisconsin did not err in affirming the decision of the trial court refusing to grant a new trial because of error in the rejection of the testimony pertaining to interstate commerce offered by the company, received and subsequently stricken out; and*

4th—That Gray is entitled to damages in this court in the full amount allowable by the rule of this court, as authorized by the statute.

Furthermore, a careful examination of *the entire record, from cover to cover, demonstrates that substantial justice has been done by the judgments of the state courts, in the case at bar.*

Conclusion.

It is therefore respectfully submitted that, upon the whole record, including the testimony stricken out, and in view of the provisions of the Federal and Wisconsin Railway Employers' Liability Acts, this writ of error should be dismissed, or that, in the alternative, the judgment of the Supreme Court of Wisconsin, affirming the judgment of the Municipal Court of Outagamie County, here in question, should be affirmed by this Court.

STEPHEN J. McMAHON,

*Attorney for Defendant in Error,
William H. Gray.*

APPENDIX.

Federal Employers' Liability Act.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"SECTION 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow, or husband and children of such employe; and, if none, then of such employe's parents;

Wisconsin Railway Employers' Liability Act.

"Crippling or Death Damages. SECTION 1816. Every railroad company shall be liable for damages for all injuries whether resulting in death or not, sustained by any of its employes, subject to the provisions hereinafter contained regarding contributory negligence on the part of the injured employe:

Roadbed and Machinery Defects. (1) When such injury is caused by a defect in any locomotive, engine, car, rail, roadbed, machinery or appliance used by its employes in and about the business of their employment.

Fellow Employes' Negligence. (2) When such injury shall have been sustained by any officer, agent, servant or employe of such company, while engaged in the line of his duty as such and which such injury shall have been caused in whole or in greater part by the negligence of any other officer, agent, servant or employe of such company, in the discharge of, or by reason of failure to discharge his duties as such.

Court's Questions to Jury. (3) In every action to recover for such injury the court shall submit to the jury the following questions: First, whether the company, or any other officer, agent, servant or employe other than the person injured was guilty of negligence directly contributing to the injury; second, if that question is answered in the affirmative, whether the person injured was guilty of any negligence which directly contributed to the injury; third, if that question is answered in the affirmative, whether the negligence of the party so injured

FEDERAL EMPLOYERS' LIABILITY ACT

and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employe, or where such injuries have resulted in death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; *Provided*, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

"SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

WISCONSIN RAILWAY EMPLOYERS' LIABILITY ACT

was slighter or greater as a contributing cause to the injury than that of the company, or any officer, agent, servant or employe other than the person so injured; and such other questions as may be necessary.

Comparative Negligence. (4) In all cases where the jury shall find that the negligence of the company, or any officer, agent, servant or employe of such company, was greater than the negligence of the employe so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover, and the negligence, if any, of the employe so injured shall be no bar to such recovery.

Question for Jury. (5) In all cases under this section the question of negligence and contributory negligence shall be for the jury.

Contracts and Rules Subordinate. (6) No contract or receipt between any employe and a railroad company, no rule or regulation promulgated or adopted by such company, and no contract, rule or regulation in regard to any notice to be given by such employe shall exempt such corporation from the full liability imposed by this section.

"Railroad Company" Defined. (7) The phrase "railroad company," as used in this section, shall be taken to embrace any company, association, corporation or person managing, maintaining, operating, or in possession of a railroad in whole or in part within this state whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver.

Conflict of Laws. (8) In any action brought in the courts of this state by a resident thereof, or the representative of a deceased resident, to recover

FEDERAL EMPLOYERS' LIABILITY ACT

"SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability, created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

"SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

"SEC. 7. That the term 'common carrier' as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"SEC. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or

WISCONSIN RAILWAY EMPLOYERS' LIABILITY ACT

damages in accordance with this section, where the employe of any railroad company owning or operating a railroad extending into or through this state and into or through any other state or states shall have received his injuries in any other state where such railroad is owned or operated, and the contract of employment shall have been made in this state, it shall not be competent for such railroad company to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state.

Shop or Office Employes. (9) The provisions of this section shall not apply to employes working in shops or offices." (Wis. Stat. 1911, pp. 1312-13.)

FEDERAL EMPLOYERS' LIABILITY ACT

to impair the rights of their employes under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled 'An Act relating to Liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employes' approved June eleventh, nineteen hundred and six.

"SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury. [Act April 22, 1908 (35 Stat. L., 65, c. 149), as amended by Act April 5, 1910 (36 Stat. 291, c. 143).]

ADMISSION OF SERVICE.

Service of the foregoing brief is hereby accepted and delivery of three copies thereof is hereby acknowledged this ^{2d}..... day of March, A. D. 1915.

Edward M. Smart,
.....

*Solicitor and Counsel for Plaintiff in Error,
Chicago and North Western Railway Company.*

FILED
MAR 19 1915
JAMES D. WAHER
CLERK

SUPREME COURT OF THE UNITED STATES

DOCTORS TERM 1914

No. 232.

**CHICAGO AND NORTHWESTERN RAILWAY
COMPANY, PLAINTIFF IN ERROR.**

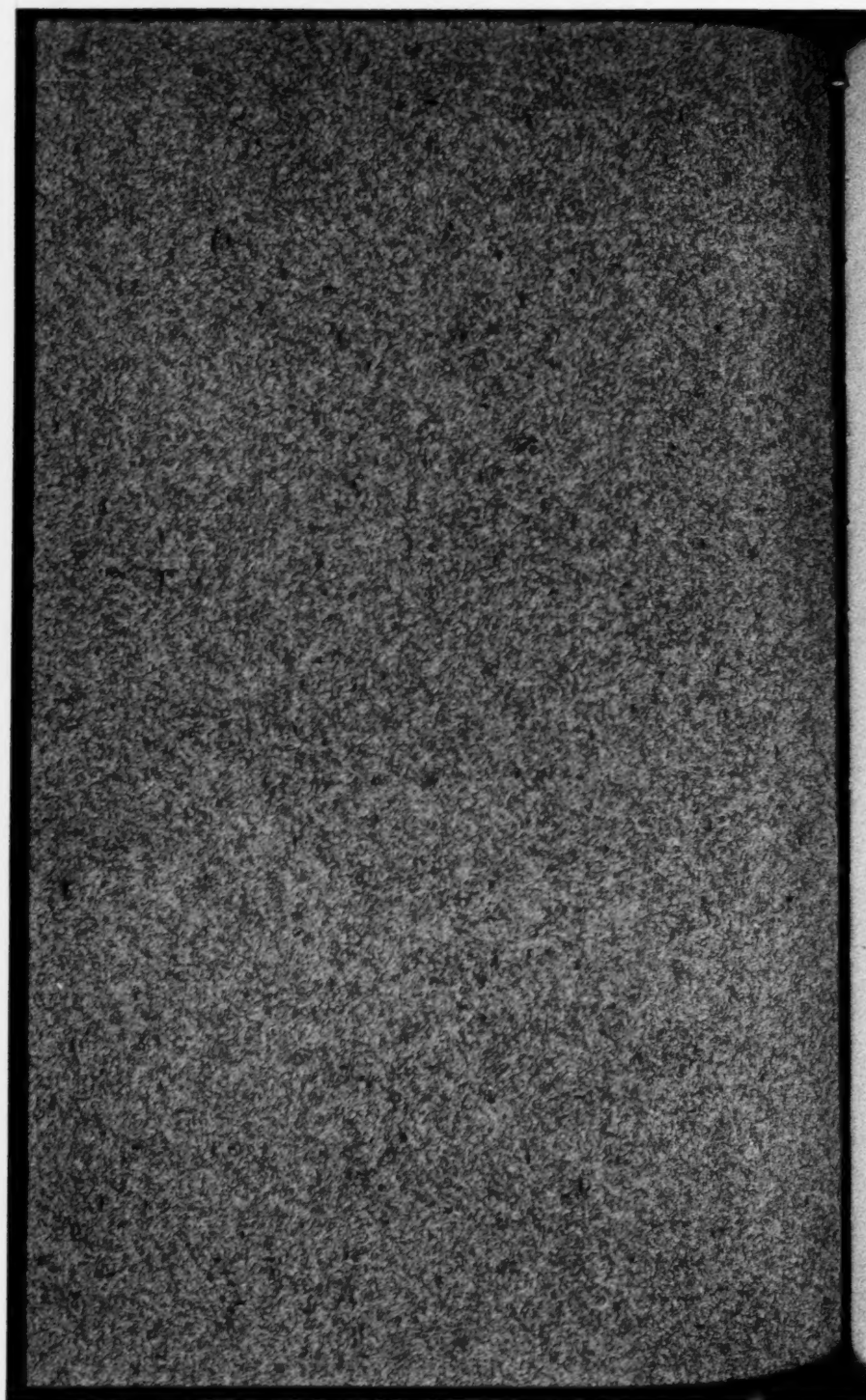
vs.

WILLIAM H. GRAY, DEFENDANT IN ERROR.

**IN ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN.**

**SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR
AND ARGUMENT IN OPPOSITION TO MOTION OF
PLAINTIFF IN ERROR TO AMEND ITS ASSIGNMENT
OF SPECIFICATION OF ERRORS.**

STEPHEN J. McMAHON,
Attorney for Defendant in Error,
William H. Gray.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 232.

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WISCONSIN.

**SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR
AND ARGUMENT IN OPPOSITION TO MOTION OF
PLAINTIFF IN ERROR TO AMEND ITS ASSIGNMENT
OR SPECIFICATION OF ERRORS.**

I.

STATEMENT OF MOTION.

On March 11, 1915, there was served on the attorney for defendant in error a motion of plaintiff in error, and notice thereof, for leave to amend its assignment of errors by in-

serting an assignment pertaining to the testimony of Mr. Armstrong on the subject of interstate commerce. On March 10, 1915, a similar motion and notice, returnable on March 23, 1915, was served. This testimony is fully set forth verbatim at pages 6 to 9 of the Brief of Defendant in Error (*post*, pp. 22-24).

Facts.

This motion and notice and the affidavit of Edward M. Smart, counsel for plaintiff in error, which accompanies the same, are set forth verbatim in an appendix to this supplemental brief and argument (*post*, pp. 21-28).

The reason for thus setting them forth is that they have not, at the time of the writing of this supplemental brief and argument, been printed.

This motion of plaintiff in error has been set for hearing before this court on March 22, 1915 (*post*, p. 21).

On March 13, 1915, there was served on counsel for plaintiff in error (*post*, p. 8) notice of opposition to this motion by defendant in error (*post*, p. 7) with the affidavits of the defendant in error (*post*, p. 8), his attorney (*post*, p. 12), Jeremiah F. Collins (*post*, p. 17), and Raymond T. Zillmer (*post*, p. 20) in support of such opposition. This notice of opposition together with these affidavits are set forth fully in the appendix herein (*post*, pp. 8-21).

These affidavits set forth facts relied on in the argument herein, in addition to the facts contained in the transcript of the record, and further attention will be called to these facts in the argument which follows.

II.

ARGUMENT.

The motion should be denied for the following reasons:

1st. (A) If there is a defect in the writ of error not susceptible of amendment, as pointed out in the first part of the first branch of the argument at pages 13 to 16 of the Brief of Defendant in Error, this court has no jurisdiction of the case, and, therefore, no jurisdiction to permit the proposed amendment to be made.

(B) Permitting the proposed amendment to be made would not in any way supply the Federal question, which is wholly wanting in this case, as pointed out in the second part of the first branch of the argument, at pages 17 to 29 of the Brief of Defendant in Error. In this part of this branch of the argument it is assumed, at the outset, solely for the purposes of the argument, that the alleged error which it is proposed to assign in the proposed amendment does not exist.

2d. Assuming, solely for the purposes of the argument, and without conceding that there was error of the character set forth in the proposed amendment, it would not be sufficiently clear, as pointed out in the second branch of the argument, at pages 29 to 32 of the Brief of Defendant in Error, that the error complained of (if error) has worked *prejudice* to the *substantial* rights of the plaintiff in error to such an extent as will *require* reversal. This assumption is also made, at the outset, in this branch of the argument.

3d. No "*plain error*" within the meaning of Rule 21 of this court, and particularly section 4 and subsection 2 of section 2 thereof, was committed by ultimately striking out the testimony covered by the proposed amendment to the

assignment of errors, as pointed out in the third branch of the argument, at pages 32 to 68 of the Brief of Defendant in Error. Since there is no such "*plain error*" this court, it is respectfully submitted, ought not "*notice*" the same, under the provisions of said section 4, to the extent of per-

Furthermore, it appears from the affidavit of defendant in error that the plaintiff in error is not entitled to any offset under section 5 of the Federal Employers' Liability Act (*post*, p. 10) ; Brief of Defendant in Error, p. 78).

By bringing this motion counsel for plaintiff in error tacitly concedes that without the proposed amendment there is no assignment of error in the record which reaches the alleged error upon which he relies; furthermore, in his affidavit he expressly makes this concession by admitting that "an assignment of error *should* have been made in the form now proposed" (*post*, p. 28).

4th. In the statement of the grounds for this motion, counsel for plaintiff in error complains that the attorney for defendant in error has made no "motion in this court, based on the inadequacy of said assignment of errors." It appears from the affidavits of the defendant in error and his attorney that the reason why no motion was made, soon after this writ of error was sued out, in his behalf, to affirm or dismiss, pursuant to Rule 6 of this court, was because of the impoverished financial condition of the defendant in error, caused by his injuries for which damages are sought in this action, and the resulting destruction of his earning capacity; that as early as November, 1913, counsel for plaintiff in error was requested to have his client advance the money necessary for the printing of the record somewhat in advance, merely, of the time when he was required to advance it, so that a motion might be made in behalf of defendant in error to "*affirm or dismiss*"; that in December, 1913, counsel for the plaintiff in error refused to thus advance such money to enable the making of such motion;

that the record was not printed until the last of September, 1914; that the case then seemed apt to be reached in its regular order early in 1915; and that this fact, coupled with the possibility of additional expense incident to the making of a motion, prevented the motion being made in the latter part of 1914. In view of these facts, the failure of the defendant in error to make a motion upon any of the grounds mentioned in Rule 6 of this court, or other grounds, ought not to be charged against the plaintiff in error or his attorney.

But, on the contrary, the refusal of counsel for the plaintiff in error to cause his client to somewhat sooner advance the money to enable the record to be printed so that such motion might be brought in behalf of defendant in error is additional evidence that this writ of error was sued out merely for delay, and, therefore, an additional reason why the defendant in error should be awarded the full amount of damages for delay authorized by the rule of this court, as pointed out in the fourth branch of the argument, at pages 68 to 71 of the Brief of Defendant in Error.

All of the foregoing reasons in opposition to the motion to amend the assignment of errors apply with equal force to the attempt made by counsel for plaintiff in error to amend the specifications of error in his brief by reprinting his brief and inserting therein the same claim of error set forth in the proposed amendment to the assignment of errors (*post*, p. 26).

That service of the reprinted brief was refused (contrary to the claims of counsel for plaintiff in error) by the attorney for defendant in error; that the explanation of such refusal found on page 1 of the Brief of Defendant in Error is founded in fact, and that the reasons for such refusal, as set forth in such explanation, with other reasons, were made known to counsel for the plaintiff in error at the time of such refusal are supported by proof, is shown by the affidavits of

the attorney for defendant in error (*post*, p. 14), Jeremiah F. Collins (*post*, p. 17) and Raymond T. Zillmer (*post*, p. 20).

It is respectfully submitted that the motion should be denied; that the writ of error should be dismissed, or the judgments of the State courts be affirmed; and that the defendant in error should be awarded the full amount of damages for delay authorized by the rule of this court.

STEPHEN J. McMAHON,
Attorney for Defendant in Error,
William H. Gray.

APPENDIX.*Notice of Opposition to Motion.*

(Title of Case Omitted.)

SIR: Please take notice that the affidavits of William H. Gray, defendant in error; Stephen J. McMahon, his attorney; Jeremiah F. Collins and Raymond T. Zillmer, copies of which are hereto annexed, will be used and relied upon by the counsel for the defendant in error in opposing the granting of the written motions of the plaintiff in error dated March 10, 1915, set for argument on the 22d day of March, 1915, and the 23rd day of March, 1915, respectively, and served on said counsel for the defendant in error on the 11th and 10th days of March, 1915, respectively, without prejudice to the rights of the defendant in error.

Please take further notice that in opposing said motions counsel for the defendant in error will also rely on the record in this case, the briefs of the counsel for the plaintiff in error and of the counsel for the defendant in error, and the whole thereof, heretofore served and filed.

And you will please take further notice that counsel for the defendant in error will be ready for the hearing and argument of this case when the case is reached and called in its regular and proper order on the docket or calendar of the above-named court for the October term, 1914, pursuant to rule 26, and more particularly section 1 thereof, of said court; that counsel for the defendant in error expects and intends to make an oral argument in this case when it is so reached upon such docket or calendar; that counsel for the defendant in error intends and expects to be present at the opening of the session of the above-named court on the 15th

day of March, 1915, and to continue in attendance upon the sessions of said court until said case, as well as said motions, is heard and argued; and that counsel for the defendant in error desires, and, to the extent that the other rules and practices of the court will permit, will insist that this case be heard and argued in its regular and proper order on the docket or calendar of the above-named court for the October term, 1914, pursuant to said rule 26, and particularly section 1 thereof.

Respectfully,

STEPHEN J. McMAHON,
Attorney for Defendant in Error.

To Edward M. Smart, Counsel for Plaintiff in Error.

Service of the above notice of motion, and affidavits, admitted this 13th day of March, 1915.

EDWARD M. SMART,
Counsel for Plaintiff in Error.

Affidavit of William H. Gray.

(Title of Case Omitted.)

STATE OF WISCONSIN,
Outagamie County, ss:

William H. Gray, being first duly sworn, on oath deposes and states that he is the above-named defendant in error in the above-entitled case, now pending in the Supreme Court of the United States;

That the reason why no motion has been made in this court in behalf of deponent to dismiss the writ of error or affirm the judgments of the Wisconsin courts because of the inadequacy of the assignment of errors of the plaintiff in error or for other cause is that deponent did not have and

could not procure the necessary money required to be advanced to the clerk of this court in order to have the transcript of the record printed previous to the time when the clerk required the defendant in error to advance the money necessary to be advanced in order to have such record printed; that deponent was informed by his attorney herein that the transcript of the record was not received by him from the clerk of this court until on or about the 21st day of September, 1914; that at that time deponent was informed and verily believed that the case would be reached for hearing in the regular order and due course about January or February, 1915; that when the transcript of the record was printed deponent was in such poor financial circumstances that he concluded to await the final hearing and determination of the case, which then seemed liable to occur so soon thereafter, to present to this court through his attorney the questions as to whether the writ of error should be dismissed or the judgments of the State courts affirmed for the reason that deponent could not afford the double expense of having briefs printed upon motions and again upon the final hearing or the other additional expense which might be necessary to the proper presentation of any motion in advance of the final hearing and in addition to the expense necessary to the proper presentation of deponent's case to this court upon the final hearing; that not later than about the latter part of December, 1914, deponent's attorney herein requested deponent to procure the money necessary to be advanced to have the transcript of the record printed; that deponent's said attorney then informed deponent that it would be necessary to advance to the clerk of this court in order to have the record printed the sum of six hundred and fifty (\$650.00) dollars; that deponent then made an effort to borrow the said sum of six hundred and fifty (\$650.00) dollars for such purpose but was unable so to do; that deponent was never able to procure by borrowing or otherwise said sum of six hundred and fifty (\$650.00) dollars;

that the reason why deponent was unable to procure and advance said sum of six hundred and fifty (\$650.00) dollars is that deponent has been wholly unable to perform any work or labor or earn any money since he was injured, as set forth in the testimony in this case on the 19th day of January, 1911; that the injuries described in said testimony have wholly destroyed his earning capacity; that deponent has gradually failed in health since the time of said injury and more particularly since the time of the trial of said case in the municipal court of Outagamie County, Wisconsin; that at the present time deponent's health is very poor; that deponent, during all of the time referred to in this affidavit has had a wife and also a minor daughter dependent upon him for support and that during a large part of said time he has also had dependent upon him for support a minor son; that during all of said time deponent has been obliged to exhaust his resources and his borrowing capacity to provide the necessities of life for his said wife and children and himself; that because of the poor health and illness of deponent he has been subjected to unusual and extraordinary expenses for medicines, the services of physicians and hospital expenses in a futile effort to regain his health; that if it had not been for the poverty of the deponent as aforesaid his attorney would have been authorized, directed and required, not later than about the 1st of January, 1915, to make a motion in this court to dismiss the writ of error herein or affirm the judgments of the State courts;

That the above-named plaintiff in error, Chicago and Northwestern Railway has not contributed or paid, does not contribute or pay, and is not to contribute or pay, in any way, any sum whatsoever to any insurance, relief benefit, or indemnity contributed or paid in any way or that may have been in any way contributed or paid by said plaintiff in error or any other corporation, association, or person to affiant or any other person entitled thereto on account of the injury to or sustained by affiant described in affiant's com-

plaint and evidence in said action, for which said action was brought; that said plaintiff in error is not, has not been, and will not be under any duty or obligation whatsoever to make such contribution or payment to any such insurance, relief benefit, or indemnity or to make any other contribution or payment whatsoever to or for the benefit of said affiant; that said affiant, his estate heirs, beneficiaries, executors, administrators, or assigns, directly or indirectly, are not, have not been, and will not be interested in or entitled to or the recipient of any contribution, payment, aid, assistance or relief from such insurance, relief benefit, or indemnity or otherwise from said plaintiff in error; that the only contribution or payment which has ever been made by said plaintiff in error to said affiant or for his benefit or otherwise is the payment of the wages earned by him from said plaintiff in error for labor performed and services rendered for it by him previous to the injury to him described in his complaint and testimony in said action and for which said action was brought; that all of such wages have been paid to him by said plaintiff in error; and that he has been unable to earn any wages from or continue in the employment of said plaintiff in error, or any other corporation, association or person, at any time since the injury for which said action was brought occurred;

That affiant makes this affidavit after mature consideration of the contents hereof; that he has carefully read the same and that the same is true to his own personal knowledge except as to those matters that are stated on information and belief and that he believes these to be true;

That this affidavit is made for the purpose of having it used by his attorney in opposition to or in support of any motion in the above-named Supreme Court of the United States touching any phase of said case, or for any other purpose for which such affidavit can be appropriately used.

WILLIAM H. GRAY.

Subscribed and sworn to before me this 13th day of March, 1915.

[NOTARY SEAL.]

H. J. MULHOLLAND,
Notary Public, Outagamie County, Wisconsin.

My commission expires Jan. 5, 1919.

Affidavit of Stephen J. McMahon.

(Title of Case Omitted.)

STATE OF WISCONSIN,
Milwaukee County, ss:

Stephen J. McMahon, being first duly sworn, on oath deposes and says that he is the attorney for the above-named defendant in error; that he has been the attorney for the defendant in error and in charge of the litigation involved in this case for him since the commencement of said litigation;

That copies of the assignments of error of the plaintiff in error and of the record were not exhibited to and seen by deponent some time during the month of July, 1913, as claimed by counsel for the plaintiff in error in his motions herein, dated March 10, 1915, and set for argument on March 22, 1915, and March 23, 1915, respectively, before this court, and served on deponent without prejudice to the rights of the defendant in error on March 11, 1915, and March 10, 1915, respectively; that deponent had no opportunity to examine said assignments of error until on or about the 1st of October, 1913; that deponent was not admitted to practice as an attorney in this court until on or about October 12, 1913;

That in November, 1913, deponent requested counsel for the plaintiff in error, orally and in writing, to cause the record in this case to be printed pursuant to rule No. 10 of

this court and particularly subsection 2 thereof; that previous to the making of such request the clerk of this court, at the request of deponent, estimated the cost of the printing of the record at six hundred and fifty (\$650.00) dollars; that at the time of the making of said request to counsel for the plaintiff in error deponent informed counsel for plaintiff in error of the amount of such estimate, and that in a letter under date of December 24, 1913, counsel for the plaintiff in error refused to cause said record to be printed in the following language quoted from his letter:

"After taking the matter up at Washington, I have come to the conclusion that I am under no obligation to have the record printed on the motion to *affirm or dismiss.*"

That at the time deponent requested counsel for the plaintiff in error to cause the record in this case to be printed deponent informed counsel for the plaintiff in error that deponent desired to make a motion in this court pursuant to rule 6 of this court; that shortly after the said refusal of counsel for the plaintiff in error deponent requested the defendant in error to procure the money necessary to be advanced to have the transcript of the record printed; that at the same time deponent informed defendant in error that the clerk had estimated the amount to be advanced to have the record printed at six hundred and fifty (\$650.00) dollars; that deponent is informed and verily believes that the defendant in error made a diligent effort to procure said money but was unable so to do; that the defendant in error, after the making of such effort, informed deponent that he was unable to procure said money then necessary to be so advanced; that at the time this deponent made such request to the defendant in error deponent informed the defendant in error that it was desirable and advisable that a motion be brought pursuant to the provisions of rule 6 of this court with a view to a speedy and final determination

and disposition of this case by this court in favor of the defendant in error and upon such grounds as might be properly advanced in behalf of the defendant in error;

That on or about October 12, 1913, deponent made oral inquiry of one of the deputy clerks of this court, the clerk being then absent on account of illness as this deponent was informed by said deputy, as to whether the clerk would require the plaintiff in error to cause the record to be printed without further delay, at the same time informing the deputy clerk of deponent's desire to make a motion pursuant to rule 6 of this court with a view to a speedy and final disposition and determination of this case by this court; and that said deputy clerk then informed this deponent that it was not the practice to cause the plaintiff in error to advance the money necessary for the printing of the record so far in advance of the time when the case would be reached in its regular order for hearing and determination by this court and said deputy clerk declined to cause the plaintiff in error to then advance such money;

That on February 6, 1915, there was served on deponent and accepted the brief of plaintiff in error; that on February 23, 1915, a carbon copy of the major part of the type-written manuscript of the body of the brief of defendant in error was delivered to the attorney for plaintiff in error; that on February 27, 1915, the balance of the copy of the manuscript was delivered to the same attorney; that said deliveries were made through the United States mails in the city of Milwaukee where counsel for the plaintiff in error and the deponent both reside and have their places of business; that in the first part of the manuscript so delivered issue was joined with all of the parts of the brief of plaintiff in error and inadequacies and insufficiencies of the assignments of error of the plaintiff in error and the specification of errors in this brief were pointed out; that throughout the whole manuscript of the brief of defendant in error there were numerous references to the brief of plaintiff in error,

citing the numbers of the pages; that on March 1, 1915, near the middle of the day, service of three (3) copies of the brief of the defendant in error reprinted with an addition to the specification in errors and an assignment of errors, as appeared from a note upon the title page of said reprinted brief of plaintiff in error reading as follows: "This brief is filed for the purpose of adding fourth (4th) specification of error," or words substantially to this effect, was tendered to this deponent and the service and the copies were by him refused;

That such service was tendered by Mr. Charles H. Gorman, an assistant of counsel for the defendant in error; that at the time of such tender said Charles H. Gorman was informed by this deponent that such service was refused; that said Charles H. Gorman was then by this deponent requested to return all of said copies of said reprinted brief to the counsel for the plaintiff in error; that as soon as it was reasonably possible for this deponent to give further attention to the matter and on the 3d day of March, 1915, this deponent requested and directed Jeremiah F. Collins to return all of said copies of said reprinted brief to said counsel for the defendant in error; that since said 3d day of March, 1915, none of said copies of said reprinted brief of the plaintiff in error have been in the possession of or in any way under the control of the deponent; that they have not been returned to deponent;

That at the time this deponent so requested and directed said Jeremiah F. Collins to return said reprinted briefs to counsel for the plaintiff in error he also requested and directed said Jeremiah F. Collins to convey to said counsel for the plaintiff in error a letter written by this deponent in which this deponent's reasons for refusing service as aforesaid and returning said copies of said reprinted brief were set forth fully;

That these reasons were that at the time of the tender of service of said reprinted brief all of the original of the

manuscript of the brief of the plaintiff in error was in the hands of the printer and the part in which issue was joined with the brief of the plaintiff in error was set in type; that in view of the fact that there were references to the brief of plaintiff in error citing the numbers of the pages, acceptance of service of said reprinted brief of plaintiff in error would necessitate a revision of the brief of the defendant in error, including the part then in type; that such revision would require additional time and expense; that a revision by deponent of said reprinted brief would bring confusion into the brief of defendant in error because of the necessity of attempting to respond to two (2) briefs of plaintiff in error with different paging; that deponent desired not to waive by acceptance of said service of said reprinted brief any of the inadequacies or insufficiencies in the assignment of errors of the brief of defendant in error served on February 6, 1915; and that according to the best information then in the possession of deponent it was probable that it was too late under the rules of said court for the plaintiff in error to serve or file a printed brief;

That these reasons were in substance stated to said Charles H. Gorman at the time that the aforesaid copies of said reprinted brief and the tender of service thereof was refused as aforesaid;

That on or about the 21st day of September, 1914, the deponent received a copy of the printed transcript of the record in this case; that at that time deponent had been informed and verily believed that this case would be reached for argument and hearing in the regular order and due course about January or February, 1915; that when said printed record was so received the defendant in error was, as this deponent is informed and verily believes, in such poor financial circumstances that he concluded to await the final hearing and determination of the case, which then seemed liable to occur so soon thereafter, to present to this court through his attorney all of the questions as to whether

the writ of error should be dismissed or the judgments of the State courts affirmed for the reason that the defendant in error could not afford the double expense of having briefs printed upon motions and again upon the final hearing or the other additional expense which might be necessary to the proper presentation of any motion in advance of the final hearing and in addition to the expense necessary to the proper presentation in the above-named court of this case upon behalf of defendant in error upon such final hearing and argument; and

That the contentions and errors relied upon in the Supreme Court of Wisconsin by the defendant in error and its counsel were made, presented, treated, and discussed in the manner stated in the decision of the Supreme Court of Wisconsin at pages 289 to 293 of the transcript of the record in this case and in no other manner.

STEPHEN J. McMAHON.

Subscribed and sworn to before me this 13th day of March, 1915.

[NOTARY SEAL.]

RAYMOND T. ZILLMER,

Notary Public, Milwaukee County, Wisconsin.

My commission expires Sept. 29, 1918.

Affidavit of Jeremiah F. Collins.

(Title of Case Omitted.)

STATE OF WISCONSIN,

Milwaukee County, ss:

Jeremiah F. Collins, being first duly sworn, on oath deposes and says that he was present on the first day of March, 1915, shortly before noon of that day, when Charles

H. Gorman made a tender of service and delivery of three (3) copies of a printed brief of the defendant in error in the above-entitled case with a note endorsed on the title page thereof as follows: "This brief is filed for the purpose of adding Fourth (4th) Specification of Error," or words substantially to this effect; that he was present during all the conversation that then occurred between said Charles H. Gorman and Stephen J. McMahon, the attorney for the defendant in error above named; that said Stephen J. McMahon refused to accept service or delivery of said copies of said brief or any copies of a brief then tendered; that said Stephen J. McMahon stated his reasons for refusing to accept said tender of service or delivery of said copies of brief to said Charles H. Gorman in substance as follows:

That these reasons were that at the time of the tender of service of said reprinted brief all of the original of the manuscript of the brief of the plaintiff in error was in the hands of the printer, and the part in which issue was joined with the brief of the plaintiff in error was set in type; that in view of the fact that there were references to the brief of the plaintiff in error, citing the numbers of the pages, acceptance of service of said reprinted brief of plaintiff in error would necessitate a revision of the brief of the defendant in error, including the part then in type; that such revision would require additional time and expense; that a revision by Stephen J. McMahon of said reprinted brief would bring confusion into the brief of defendant in error because of the necessity of attempting to respond to two (2) briefs of plaintiff in error with different paging; that Stephen J. McMahon desired not to waive by acceptance of said service of said reprinted brief any of the inadequacies or insufficiencies in the assignment of errors of the brief of defendant in error served on February 6, 1915, and that, according to the best information then in the possession of Stephen J. McMahon, it was probable that it was too late,

under the rules of said court, for the plaintiff in error to serve or file a printed brief;

That on the 3d day of March, 1915, at about the hour of 5:30 o'clock P. M., this deponent, at the request and under the directions of said Stephen J. McMahon, returned to Edward M. Smart, counsel for the defendant in error, all of the aforesaid copies of said printed brief so tendered by said Charles H. Gorman to said Stephen J. McMahon; that he delivered the same to said Edward M. Smart personally at his office, delivering all of said copies of said printed brief; that deponent then and there left all the said copies with and in the possession of said Edward M. Smart; that said Edward M. Smart then and there retained the possession and control of all of said copies of said printed brief; that at the time that the deponent so returned all of said copies of said printed brief to said Edward M. Smart, the deponent then and there delivered to said Edward M. Smart a letter addressed to him and dated March 3, 1915, and signed by said Stephen J. McMahon, in which letter the aforesaid reasons as heretofore stated in substance for the refusal of said Stephen J. McMahon to accept the tender of service made by said Charles H. Gorman as aforesaid were fully set forth; that said Edward M. Smart accepted and retained said letter in the same manner and at the same time and place that he accepted and retained as aforesaid all of the copies of said printed brief.

JEREMIAH F. COLLINS.

Subscribed and sworn to before me this 13th day of March, 1915.

[NOTARY SEAL.] RAYMOND T. ZILLMER,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Sept. 29, 1918.

Affidavit of Raymond T. Zillmer.

(Title of Case Omitted.)

STATE OF WISCONSIN,
Milwaukee County, ss:

Raymond T. Zillmer, being first duly sworn, on oath deposes and says that he was present on the first day of March, 1915, shortly before noon of that day, when Charles H. Gorman made a tender of service and delivery of three (3) copies of a printed brief of the defendant in error in the above-entitled case, with a note endorsed on the title page thereof as follows: "This brief is filed for the purpose of adding Fourth (4th) Specification of Error," or words substantially to this effect; that he was present during all the conversation that then occurred between said Charles H. Gorman and Stephen J. McMahon, the attorney for the defendant in error above named; that said Stephen J. McMahon refused to accept service or delivery of said copies of said Stephen J. McMahon, stated his reasons for refusing to accept said tender of service or delivery of said copies of brief to said Charles H. Gorman in substance as follows:

That these reasons were that at the time of the tender of service of said reprinted brief all of the original of the manuscript of the brief of the plaintiff in error was in the hands of the printer, and the part in which issue was joined with the brief of the plaintiff in error was set in type; that in view of the fact that there were references to the brief of the plaintiff in error, citing the numbers of the pages, acceptance of service of said reprinted brief of plaintiff in error would necessitate a revision of the brief of the defendant in error, including the part then in type; that such revision would require additional time and expense; that a revision by said Stephen J. McMahon of said reprinted brief would bring confusion into the brief of defendant in error

because of the necessity of attempting to respond to two (2) briefs of plaintiff in error with different paging; that said Stephen J. McMahon desired not to waive by acceptance of said service of said reprinted brief any of the inadequacies or insufficiencies in the assignment of errors of the brief of defendant in error served on February 6, 1915; and that, according to the best information then in the possession of said Stephen J. McMahon, it was probable that it was too late, under the rules of said court, for the plaintiff in error to serve or file a printed brief.

RAYMOND T. ZILLMER.

Subscribed and sworn to before me this 13th day of March, 1915.

[NOTARY SEAL.]

THEO. ZILLMER,

Notary Public, Milwaukee County, Wis.

My commission expires Nov. 5, 1915.

Notice of Motion.

(Title of Case Omitted.)

SIR: Please take notice that the plaintiff in error, Chicago and North Western Railway Company, will, at the regular motion day of the above-entitled court, to wit, March 22, 1915, at the opening of court on said day, or as soon thereafter as counsel can be heard, or in case the said cause shall be called for argument prior to said date, then at the time said cause is called for argument, move the court, as set forth in the annexed written motion.

Respectfully,

EDWARD M. SMART,

Counsel for Plaintiff in Error.

To Stephen J. McMahon, Attorney for Defendant in Error.

Service of the above notice of motion admitted this 11th day of March, 1915, without prejudice, however, to the rights of the defendant in error.

STEPHEN J. McMAHON,
Counsel for Defendant in Error.

Motion of Plaintiff in Error.

(Title of Case Omitted.)

And now comes the above-named plaintiff in error, Chicago and North Western Railway Company, and on the record herein, the briefs of counsel heretofore served and filed, and the affidavit of Edward M. Smart, hereto annexed, and moves this honorable court for leave to amend the assignment of errors in these proceedings by adding to such assignment of errors, at the end of the seventh assignment of error, found on page 7 of the record (Trans., p. 3), a further and additional assignment of error, in the following words, to wit:

"Eighth. That the municipal court did not err in rejecting and striking out the testimony of the witness Armstrong, which was in substance as follows:

"Mr. ARMSTRONG, recalled by the defendant: I am familiar with the character and kind of business done by the Chicago and North Western Railway Company on our division at Antigo. As I understand it, interstate traffic is the exchange of business between two States.

"Q. At and prior to the plaintiff's accident was the North Western road, its trains, engines, and employees engaged in hauling cars of freight continuously between Michigan and State of Wisconsin and points in Illinois and State of Wisconsin?

"A. Yes, sir.

"Moved to have the answer struck out. Motion granted.

"'Objected to because it does not appear what employees are meant, and further objection is immaterial, incompetent, and irrelevant as to whether their engines, their employees, and their trains and crews may have or might have been in any respect engaged in interstate traffic, and that the only thing material, if at all, would be the use made of this particular engine, that is, the engine on which the plaintiff was hostler.

"'By the COURT: Objection sustained. The only question is as to this engine, as I can see it; the engine on which this person was engaged at the time.

"'By Attorney MARTIN: My objection goes to all of these questions: 1st. Because the witness is not competent. 2d. Because the testimony is not admissible under the pleadings. 3d. The testimony itself is incompetent, irrelevant, and immaterial.

"'Engines that were being hostled at this round-house at the time in question were making trips from Antigo to Ashland, going through Michigan. At the same time engines and trains were making connection with the Watersmeet branch (elsewhere appearing to be in Michigan). Engines running south won't run out of the State, but in coming to and going from the south they handle refrigerator cars from Chicago. The dispatcher is under the jurisdiction of the foreman of the round-house, and Mr. Gray was under the dispatcher's jurisdiction. The round-house is the place where all these engines that come in from runs there rest. They clean all the coal and cinders out and get wood and water and are put in there to stay until the next trip. Some repairs are done in the round-house, too. The dispatcher takes the engine, after the train crew leaves it, near the round-house. The round-house, with the coal shed, sand-house and cinder pit and the blow-off box and these other buildings are all crowded together. I know of no definition in the railroad service as to what constitutes employees, or who shall be employed on the road, and no standard is fixed so far as I can see as to where the division line is.

"'Exhibit "9" is a photograph taken at or near the north end of the cinder pit looking south in the city of Antigo.

"The plaintiff now moves to strike out all the testimony of this witness except his testimony identifying Exhibit "9," for the reason urged in our objection to the testimony when first offered, that is the testimony elicited from this witness since he was last called to the witness stand, and bearing generally upon the question of so-called interstate traffic.

"The motion is granted as far as the testimony goes to the phase of interstate traffic.

"Whereupon the defendant duly excepted.

"The plaintiff moves to strike out the balance of the testimony, for the reason it is immaterial, incompetent, and irrelevant, and now moves to strike it out.

"The motion is granted.

"Whereupon the defendant duly excepted" (Trans., pp. 236 to 238).

Plaintiff in error submits the following statement of facts and objects of this motion:

This is a proceeding in error to review a decision and judgment of the Supreme Court of the State of Wisconsin affirming a judgment of the municipal court of Outagamie County, Wisconsin, in a personal injury action brought by the defendant in error against the plaintiff in error to recover damages on account of injuries received by the defendant in error while in the employ of the plaintiff in error. The respective parties will be referred to as "Gray" and "Railway Company."

Gray was run down and injured by an engine in the railroad yards at Antigo, Wisconsin, while employed by the railroad company as an engine dispatcher.

The complaint in the action was not brought under the Federal Employers' Liability Act, and did not disclose that either Gray or the railroad company were employed in interstate commerce at the time of the injury. Gray, in presenting his case in the trial court, proved the facts showing the nature and character of his employment and duties, but did not disclose employment in interstate commerce. When the railroad company took the case, in addition to other facts

proven in the case without objection, it introduced the evidence of the witness Armstrong, set forth in the above proposed additional assignment of error, which evidence was subsequently stricken out, as above set forth, for the reasons specified. It was claimed by the railway company that this proof, together with the other facts admitted in evidence, showed or tended to show employment by Gray in interstate commerce, and that if there was any liability on account of such injury, it was governed and determined solely by the Federal Employers' Liability Act.

Judgment was rendered against the railway company in the trial court, and an appeal was taken to the Supreme Court of the State of Wisconsin, wherein the judgment of the trial court was affirmed in an opinion, decision, and judgment of the said Supreme Court, which is fully set forth in the record (Trans., pp. 286, 293).

The said Supreme Court held, under the evidence received and the said evidence so stricken out as aforesaid, that the said Gray was not employed in interstate commerce. While it is true that in said court the error reviewed by it was the ruling of the trial court striking out the said evidence, yet it is apparent from said opinion that the court treated the same as if admitted, and then determined the nature and character of Gray's employment from said evidence and all the other evidence in the case; that thereupon the railway company filed its petition for writ of error, and made assignments of error, as set forth in the record (Trans., pp. 3 and 4); that said record was filed in this court on the 2d day of August, 1913, and the same was printed, and copies thereof delivered to counsel for plaintiff in error on or about the 21st day of September, 1914; that copies of the said assignments of error and the record were exhibited to and seen by the counsel for the defendant in error some time during the month of July, 1913.

That on the 6th day of February, 1915, counsel for the railway company duly served upon counsel for Gray a copy

of his original brief; that a few days before March 1, 1915, counsel for Gray submitted to counsel for the railway company a copy of a part of the manuscript of his brief, wherein was set forth and argued the point that the assignment of errors and specification of errors were insufficient under the statutes and rules of this court, which said point and argument are now set forth on pages 32 and 33 of the printed brief of defendant in error.

That immediately upon receiving said manuscript brief, as aforesaid, counsel for the railway company reprinted his brief under the title of "Amended Brief of Plaintiff in Error," and added thereto a fourth "Specification of Error," which said fourth specification of error is found on pages 11 and 12 of "Amended Brief of Plaintiff in Error," in the same language as is set forth in the above proposed eighth assignment of error; that the said reprinted and amended brief was duly and personally served on counsel for Gray on the 1st day of March, 1915, at 10:30 a. m., as appears by the proof of service on file in this court, and thereupon thirty copies of the said "Amended Brief of Plaintiff in Error" were immediately and duly filed with the clerk of this court, and are now on file herein; that at the time of the service of said amended brief of plaintiff in error the brief of defendant in error was in the process of being printed, and was thereafter completed and served on counsel for the railway company on the 3d day of March, 1915, at 5:30 p. m.; that counsel for the railway company had never, prior to the service of said manuscript, received any notice or intimation from counsel for Gray of his intention to make such a point, or his claim in regard thereto, nor has the said counsel ever made any motion in this court based on the inadequacy of said assignment of errors.

That the failure of counsel for the railway company to make proper specification of errors was due to inadvertence and oversight and due to the peculiar manner in which the question was raised, discussed, and disposed of in the State

Supreme Court, as more particularly set forth in the affidavit of counsel for the railway company hereto annexed.

Counsel for plaintiff in error submits the following authorities on the proposition that this court has power and authority to permit amendment of assignment of errors, to wit:

2 Encyclopedia Pleading and Practice, 920.

Ackley *vs.* Hall, 106 U. S., 428.

Bunyan *vs.* Loftus, 57 N. W., 685.

Hall *vs.* Railway, 84 Ia., 311.

Hubbard *vs.* Garner, 73 N. W., 390.

EDWARD M. SMART,
Counsel for Plaintiff in Error.

Dated March 10, 1915.

Affidavit of Edward M. Smart.

(Title of Case Omitted.)

STATE OF WISCONSIN,
Milwaukee County, ss:

Edward M. Smart, being first duly sworn, on oath says that he is counsel for the above-named plaintiff in error; that he has read the foregoing and annexed motion and statement of facts and objects of motion, and that the facts and objects therein set forth are true, as he verily believes; that the failure to make an accurate assignment of errors in this proceeding was due entirely to affiant's inexperience in proceedings of this kind, and also to the inadvertence and oversight of affiant.

Affiant further says that proceedings by way of writ of error to review the decisions of inferior tribunals is not employed excepting in criminal cases and rare instances in the

State of Wisconsin, the common and statutory method of review in said State being by statutory appeal; that affiant has never, in any proceeding heretofore, excepting in one instance, sued out a writ of error; affiant further says that the reason why said proposed assignment of error was not made in the form now proposed was that because of the manner in which the said questions raised thereby were treated and discussed in the Supreme Court of the State of Wisconsin he was led to believe, and did believe, that the said court treated the evidence rejected the same as if it had been admitted, and decided the whole question the same as if said evidence had been admitted; that by reason thereof affiant inadvertently overlooked the fact that the said ruling was technically a ruling on the rejection of evidence, and for that reason an assignment of error should have been made in the form now proposed.

Affiant further says that no harm or prejudice has been done to the defendant in error, and the said defendant in error and the plaintiff in error have both fully set forth the facts and rulings in their respective briefs, and have fully set forth at length in said briefs the evidence so rejected.

EDWARD M. SMART.

Subscribed and sworn to before me this 10th day of March, 1915.

ALBERT M. KELLY,
Notary Public, Milwaukee County, Wisconsin.

My commission expires October 13, 1918.

CHICAGO A. NORTHWESTERN RAILWAY
COMPANY v. GRAY.

ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN.

No. 232. Argued April 19, 20, 1915.—Decided May 3, 1915.

This court will not express an opinion on the question of whether or not the trial court should have found that the injured employé was engaged in interstate commerce, where the error, if any, did the appellant no harm.

Where the claim of defendant railroad company against whom the verdict was rendered is that the plaintiff was engaged in interstate commerce and the case should have been tried under the Federal instead of the state statute, and the finding of the jury was warranted by the evidence, this court will not reverse if it does not appear that the defendant's position was worse because the state, instead of the Federal, law governed the case.

Under the Wisconsin law assumption of risk is merely a case of contributory negligence, and a finding of the jury that the plaintiff was not guilty of contributory negligence excludes the possibility that he assumed the risk.

THE facts, which involve the validity of a judgment for damages for personal injuries, are stated in the opinion.

Mr. Edward M. Smart for plaintiff in error.

Mr. Stephen J. McMahon for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries. The plaintiff, Gray, was a hostler at Antigo, Wisconsin, having various duties as to receiving and preparing engines for departure, including the emptying of their ashes into the cinder pit and seeing that the coals in the pit were wet down. Just before the accident he had visited the cinder pit, to see whether the cinder pit man was doing his work, and had walked northward a short distance along a path between the track and a coal shed to a point opposite a rest house where he would await his next call to duty. He started to cross the track to the rest house and was struck by an engine coming from the south. The defendant offered evidence showing that it was an interstate road and that the round house and cinder pit served indifferently engines that passed the state line and those moving within the limits of the State, but did not attempt to show how the engine that struck the plaintiff was engaged. The evidence was rejected and the Supreme Court of the State sustained the rejection on the ground that it did not appear that the plaintiff's entire work consisted in the dispatching of engines engaged in interstate commerce or that he was employed in such commerce at the moment. It may be assumed that the railway company sufficiently saved its rights. The plaintiff got a large verdict, the jury finding specially that the engine that hit the plaintiff went north of the cinder pit in violation of the order of the defendant, that the engineer's negligence was the proximate cause of the injury, and that the plaintiff was guilty of no negligence that proximately contributed to the harm.

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Of course the argument for the railway company is that Gray's employment on the cinder pit was employment upon an instrument of interstate commerce and so an employment in interstate commerce as fully as that of the track repairer in *Pedersen v. Del., Lack. & West. R. R.*, 229 U. S. 146; see also *St. Louis, San Francisco & Texas Ry. v. Seale*, 229 U. S. 156; and that he was on duty at the time when he was struck as much as the fireman in *North Carolina R. R. v. Zachary*, 232 U. S. 248. But we find it unnecessary to express an opinion upon this argument since if there was an error it seems to have done the railway company no harm.

There are differences and similarities between the Wisconsin and Federal statutes, but we do not perceive that there is any difference that made the railway company's position worse if tried on the hypothesis that the state law governed. It is suggested that under the law of the United States the defendant could have argued that the plaintiff assumed the risk of this kind of negligence because he knew that it was a common occurrence for engines to run north of the cinder pit, not giving the proper signals. Without considering whether the testimony at all warranted a finding that Gray assumed the risk of a fellow servant's negligence, we deem it enough to say that by the Wisconsin law assumption of risk is merely a case of contributory negligence and that the finding of the jury that the plaintiff was not guilty of contributory negligence excludes the possibility that he assumed the risk. It also makes it unnecessary to consider differences between state and United States law that would have assumed importance had the finding upon contributory negligence been the other way. It is enough to add that the finding of the jury was warranted by the evidence. The plaintiff in error suggests that the special verdict required under the state law was improper under the United States law, but we see no ground for complaint in that. We need go no

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- farther as to the rest of the case than to say that no plain error appears. *Yazoo & Miss. Val. R. R. v. Wright*, 235 U. S. 376, 378.

Judgment affirmed.
